Supreme Court, U.S.
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No. 10-801

In the
Supreme Court of the United States

JOSE VALLE, INDIVIDUALLY, AND AS REPRESENTATIVE OF THE ESTATE OF OMAR ESPARZA, AND ASUNCION VALLE,
Petitioners,

v.

THE CITY OF HOUSTON, TEXAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To establish municipal liability under 42 U.S.C. § 1983 for failure to train, must a plaintiff prove a prior pattern of unconstitutional conduct even if the municipality is aware of the likelihood of that unconstitutional conduct occurring?

   (*A similar question is pending in *Connick v. Thompson*, No. 09-571, which was argued October 6, 2010).

2. If a municipal policy delegates final decision-making authority to an official who authorizes unconstitutional conduct pursuant to that policy, is that official a "policymaker" such that the municipality is subject to § 1983 liability?

PARTIES TO THE PROCEEDING

The caption names all of the parties to the proceedings in the court of appeals below.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

A. A police supervisor issues a memorandum to the chief that untrained officers could "shoot and kill" mentally unstable people, leaving the city liable. 2

B. Acting under orders from a captain, untrained officers forcibly enter a side door in the Valles' home and kill Omar. 4

C. The federal courts, though finding the officers' conduct "very troubling," conclude that there is no liability. 6

REASONS FOR GRANTING THE PETITION ... 8

I. This Court Should Hold This Petition Pending *Connick* Because This Case Raises Similar Questions of Failure-To-Train Liability, But in the Police Context. 8

A. As *Connick* recognizes, the Circuits employ conflicting approaches to failure-to-train claims. 8

B. Under the proper approach, the Fifth Circuit's decision cannot stand. 11

C. Once *Connick* is decided, this Court should either remand to the Fifth Circuit or grant review to consider failure-to-train claims in the policing context. . . . 13

II. The Court Should Resolve the Conflicting Approaches to Deciding When Delegation of Power Makes a City Official a "Policymaker" Under *Pembaur*. 14

A. The circuits employ conflicting approaches to this question. 14

B. The proper approach would require reversal of the decision below. 16

C. This is an important federal question arising in § 1983 suits against municipalities. 18

CONCLUSION 19

APPENDIX

Appendix A: Opinion, In the United States Court of Appeals for the Fifth Circuit, (July 30, 2010) 1a

Appendix B: Order, In the United States District Court for the Southern District of Texas, Houston Division, (August 24, 2009) 26a

Appendix C: Order, In the United States District Court for the Southern District of Texas, Houston Division, (March 27, 2009) 58a

Appendix D: Order denying rehearing, In the United States Court of Appeals for the Fifth Circuit, (September 15, 2010) 84a

Appendix E: General Order 600-05, Houston Police Department, excerpt (February 17, 1995) 86a

Appendix F: Standard Operating Procedures, Notification Procedures for SWAT Team Response, Houston Police Department, (October 30, 1987) 95a

Appendix G: Crisis Intervention Team, Training Proposal, Houston Police Department, excerpt (December 2004) 97a

TABLE OF AUTHORITIES

CASES

Allen v. Muskogee,
119 F.3d 837 (10th Cir. 1997) 11

Bd. of Cnty. Commr's of Bryan Cnty. v. Brown,
520 U.S. 397 (1997) 9, 10

Chew v. Gates,
27 F.3d 1432 (9th Cir. 1994) 15

City of Canton v. Harris,
489 U.S. 378 (1989) 9, 10, 12

City of St. Louis v. Praprotnik,
485 U.S. 112 (1988) 6, 15, 16

Connick v. Thompson,
553 F.3d 836, *reh'g en banc*, 578 F.3d 293 (2009), *cert. granted*, No. 09-571 (U.S. argued Oct. 6, 2010) ..... *passim*

Estate of Harvey v. Jones,
No. C05-1170 RSM, 2006 WL 909980 (W.D. Wash. Apr. 6, 2006) 11

Feliciano v. City of Cleveland,
988 F.2d 648 (6th Cir. 1993) 18

Kujawski v. Bd. Of Commr's of Bartholomew Cnty.,
183 F.3d 734 (7th Cir. 1999) 15

Monistere v. City of Memphis,
115 Fed. Appx. 845, 2004 WL 2913348 (6th Cir. Dec. 17, 2004) 16, 18

Myers v. City of Cincinnati,
14 F.3d 1115 (6th Cir. 1994) 16

Pembaur v. City of Cincinnati,
475 U.S. 469 (1986) 6, 14, 15, 17

Simpson v. Univ. of Colo.,
500 F.3d 1170 (10th Cir. 2007) 9

Young v. City of Providence,
404 F.3d 4 (1st Cir. 2005) 10

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 1, 6, 18

PETITION FOR A WRIT OF CERTIORARI

The Valles respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 613 F.3d 536 (5th Cir. 2010) and is reproduced in the Appendix at 1a. The decisions of the U.S. District Court for the Southern District of Texas are not reported but are reproduced in the Appendix at 26a and 58a.

JURISDICTION

The court of appeals issued its judgment on July 30, 2010. Pet. App. 1a. The court denied petitioners' timely petition for rehearing on September 15, 2010. Pet. App. 84a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 42, section 1983, of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioners, Jose and Asuncion Valle, had a son named Omar who suffered from severe depression and anxiety. On one particularly difficult day for Omar, he locked himself in the family home. The Valles became concerned and called 911. While a Houston police officer trained in dealing with mentally unstable people talked with Omar through the front door, four other officers (acting under a captain's orders) forced entry through a side door and shot and killed Omar. He was unarmed and had committed no crimes. Worse, just a few years earlier a supervising officer had written a proposal for training procedures in these precise situations so that untrained officers would not wrongfully "shoot and kill the mental health consumer." Applying principles of municipal liability that have received conflicting treatment in the circuits (and that this Court is currently considering in the recently argued case of *Connick v. Thompson*), the Fifth Circuit concluded that the City of Houston could not be liable here. The sequence of relevant events is briefly described below.

A. A police supervisor issues a memorandum to the chief that untrained officers could "shoot and kill" mentally unstable people, leaving the city liable.

Before this particular tragedy occurred, the Houston Police Department had experienced a number of encounters in which officers had killed mentally unstable people. Pet. App. 20a, 100a. The

Department had established a Crisis Intervention Team ("CIT") to handle such encounters, but high-level officers at the Department were concerned that the Department was failing to employ the CIT officers, at risk to citizens' lives and to legal liability for the Department. Pet. App. 13a, 98a-107a.

In December 2004, CIT Supervisor Mike Webb issued an urgent written request for a change in CIT training. Pet. App. 98a-107a. He ended his plea with the admonition that if the Department kept sending untrained officers to these mental-health crises, more deaths would result:

> The Houston Chronicle has printed stories on the use of force in our department. In each article, the Chronicle has pointed out this under-utilization [of CIT officers] in our program . . . . We know CIT training works to help de-escalate crises and helps keep officers and mental health consumers safe. Having such a high percentage of CIT calls cleared by non-CIT officers is a potential liability for the department. *If we dispatch a non-CIT officer to a CIT call and the officer shoots and kills the mental health consumer, the community will ask why we didn't use a CIT officer. We could be liable if a CIT officer was available but not used.* We could also be liable for not providing adequate training to the non-CIT officers we know are responding to a high percentage of our CIT calls.

Pet. App. 14a, 103a (emphasis added). This training proposal had been requested by an assistant chief and

was sent on to the Chief of Police, but no changes were adopted.

B. Acting under orders from a captain, untrained officers forcibly enter a side door in the Valles' home and kill Omar.

For months, Omar had been suffering from depression and anxiety. One day he locked himself inside the family home, refusing to allow his parents to enter. After about an hour, the Valles called 911 for assistance in getting him medical care. Pet. App. 2a.

The 911 dispatcher sent Department officers to the home. The Valles showed the first officer on the scene papers from their previous attempts to have Omar admitted to a hospital for psychiatric treatment. They requested that the officer help them get medical care for Omar. The officer approached the front door and spoke with Omar. Other officers then arrived and also spoke with Omar, but he refused to come out of the house, and he refused to let anyone in. Pet. App. 2a-3a.

The officers contacted their supervisor, Sergeant Bryant, who assumed control of the situation when he arrived. He similarly made little progress talking with Omar, so he contacted police headquarters for instructions. Captain Williams of the Tactical Operations Division directed him to get a CIT officer involved to talk with Omar. CIT Officer Broussard arrived at the scene and began talking with Omar through the front door, using her training and experience to de-escalate the crisis to a safe resolution. Pet. App. 3a.

Meanwhile, without consulting Broussard, the other officers—who were not CIT trained—sought and received permission from Captain Williams to forcibly enter the home. Yet, as the court below acknowledged, Omar "was not a suspect in any criminal activity, nor had he threatened the officers or himself." Pet. App. 3a.

Captain Williams had full authority to determine what level of force to employ, under the City's General Order 600-05. Pet. App. 93a-94a. And under Special Operating Procedure 200/10.1, he could also determine not to employ SWAT or hostage-negotiation procedures, but to use other arrest procedures. Pet. App. 95a. All patrol officers in the field were required by GO 600-05 to contact the captain when faced with a special-threat situation.

Though he was not at the scene and had no communication with CIT Officer Broussard, Captain Williams authorized the entry and seizure. Unbeknownst to Broussard and Omar (who were still talking at the front door), four of the untrained officers accordingly broke in a side door, and within 30 seconds began firing. First, they fired non-lethal weapons, including a taser that missed Omar. Then an officer fired his 40-caliber automatic pistol six times—hitting Omar with three fatal shots. As the dust settled, Omar's mother entered and saw him lying on the floor, dying. Pet. App. 3a-4a.

The Department later disciplined Captain Williams for approving the forcible entry into the Valles' home. That reprimand, however, was overturned by a civil-service examiner on the basis that Captain Williams

had "acted within the policies and procedures of the police department." Pet. App. 4a.

C. The federal courts, though finding the officers' conduct "very troubling," conclude that there is no liability.

The Valles brought this § 1983 suit against the City alleging violations of the Fourth and Fourteenth Amendments flowing from the officers' entry of the home and the lethal seizure of Omar. The Valles contended that (1) the officers used excessive force in entering the home and seizing Omar pursuant to a City policymaker's orders, and (2) the City was liable for failing to properly train the officers who entered the home and killed Omar.

The district court granted summary judgment to the City, and the Fifth Circuit affirmed. Rejecting the first claim, the Fifth Circuit concluded that Captain Williams was not a "policymaker" as required for city liability under this Court's decisions in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). Pet. App. 11a-12a. Though acknowledging that Captain Williams had been delegated the discretion to make the decision to forcibly enter the home, the Fifth Circuit said that other policies "constrained his authority and set forth the range of choices which he could make in a given situation." *Id.*

The Fifth Circuit also rejected the failure-to-train claim. The court first concluded that the Valles presented sufficient evidence of both a failure to train and a showing that the failure was the cause of the "escalation of force." Pet. App. 17a-18a. The court

acknowledged, based on Officer Webb's proposal for CIT training to avoid such incidents, that "City officials were aware of the potential for constitutional violations in situations involving mentally ill persons." Pet. App. 19a-20a. Yet the court upheld summary judgment because it concluded that, despite the City's awareness of the potential violation, "[t]he Valles did not link this potential for constitutional violations to a *pattern of actual violations* sufficient to show deliberate indifference." *Id.* (emphasis added). Moreover, the court acknowledged that deliberate indifference may be shown by a "single incident" and that "the actions and decisions of the officers involved in this unfortunate shooting [were] very troubling," but concluded that "the Valles did not present sufficient evidence to show that the *highly predictable consequence* of sending non-CIT officers in response to their call for help would result in the shooting of their son." Pet. App. 25a (court's emphasis).

After the Fifth Circuit's decision, this Court heard oral argument in *Connick v. Thompson*, 553 F.3d 836, *reh'g en banc*, 578 F.3d 293 (2009), *cert. granted*, No. 09-571 (U.S. argued Oct. 6, 2010) which asks the Court to interpret and apply the various principles of municipal liability—particularly for failure-to-train claims—at issue here.

The Valles now respectfully petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This case presents two issues worthy of the Court's review.

First, the pending decision in *Connick v. Thompson* will address the principles of municipal liability for a failure-to-train claim, particularly where the defendant is a prosecutor's office. Accordingly, this Court should hold this petition pending the *Connick* decision and then either remand to the Fifth Circuit for reconsideration in light of *Connick* or grant certiorari to resolve the *Connick* questions as they apply to failure-to-train claims in the police context.

Second, lower courts have wrestled with how to assess whether a final decisionmaker who is delegated authority to act for the municipality is also a "policymaker." This case presents the opportunity to resolve that vexing and recurring issue.

Certiorari should be granted.

I. This Court Should Hold This Petition Pending *Connick* Because This Case Raises Similar Questions of Failure-To-Train Liability, But in the Police Context.

A. As *Connick* recognizes, the Circuits employ conflicting approaches to failure-to-train claims.

As Respondents' Brief in *Connick* explains, this Court has recognized that a local government entity may be liable for failing to train its employees so as to avoid violating the constitutional rights of citizens.

City of Canton v. Harris, 489 U.S. 378, 388 (1989); *see generally* Br. of Respondents at 26, *Connick v. Thompson*, No. 09-571. To establish liability, a plaintiff must show: (1) failure to provide adequate training; (2) a causal connection between that failure and the constitutional violation suffered by the plaintiff; and (3) deliberate indifference to the plantiff's constitutional rights. *City of Canton*, 489 U.S. at 388.

The key to establishing the last prong (deliberate indifference) is awareness by the municipality that its failure to train will likely lead to violations. *See* Br. of Repondents at 27, *Connick* ("Under *Canton* and *Monell*, the touchstone is awareness."). Thus, "[i]f a policymaker is aware of the need for training and the likelihood of constitutional injury, and he or she fails to provide the required training, liability attaches." *Id.* Establishing a pattern of prior violations is simply one way, among many, to show such awareness. Indeed, "the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability." *Bd. of Cnty. Commr's of Bryan Cnty. v. Brown*, 520 U.S. 397, 400 (1997) (citing *Canton*, 489 U.S. at 390 & n.10).

Circuits recognize that a municipality's awareness of the problem can obviate the need to show a pattern of the problem previously occurring. *See, e.g.*, *Simpson v. Univ. of Colo.*, 500 F.3d 1170, 1178 (10th Cir. 2007) ("In applying this standard we take note of *Canton*'s discussion of what is meant by an 'obvious' need for training. It recognized that a need could be 'obvious'

for reasons *other than knowledge of previous incidents within the municipality*.") (emphasis added); *see also* Br. of Respondents at 34-35 n.4 (citing cases).

Connick presents these questions in the prosecutorial context: whether imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravenes the culpability and causation standards of *Canton* and *Bryan County*. In *Connick*, a Fifth Circuit panel affirmed the finding of liability, noting that if the need for training is obvious and the violation of rights is a highly predictable consequence of the failure to train, then a prior pattern of unconstitutional conduct is not required. 553 F.3d 836, 852 (2009). The en banc court split 8 to 8, leaving the panel decision intact. Judges disagreeing with the original panel would have reversed the judgment on the grounds that without evidence of a pattern of prior similar violations, "the need for training is simply not 'so obvious,'" and therefore deliberate indifference could not be shown. 578 F.3d 293, 300 (2010) (on rehearing en banc).

This case, on the other hand, raises the failure-to-train question in the policing context, where other circuits have taken a different approach than the Fifth Circuit did here. Specifically, they did not require the showing of a pattern of prior misconduct.

Some circuits have applied these principles particularly where the training failures relate to the use of deadly force. *See, e.g.*, *Young v. City of Providence*, 404 F.3d 4, 28, 29 (1st Cir. 2005) ("Although there was no evidence of a prior friendly fire shooting, a jury could find from the testimony of Commissioner Partington, Melaragno, and Boehm that

the department knew that there was a high risk that absent particularized training on avoiding off-duty misidentifications, and given the department's always armed/always on-duty policy, friendly fire shootings were likely to occur.").

The principles also govern police interaction with mentally unstable individuals. *See, e.g.*, *Allen v. Muskogee*, 119 F.3d 837, 843, 844 (10th Cir. 1997) ("The evidence [regarding the City's training for officers engaging emotionally disturbed persons] is sufficient to support an inference that the need for different training was so obvious and the inadequacy so likely to result in violation of constitutional rights that the policymakers of the City could reasonably be said to have been deliberately indifferent to the need."); *Estate of Harvey v. Jones*, No. C05-1170 RSM, 2006 WL 909980, at *12 (W.D. Wash. Apr. 6, 2006) ("The Court finds that this evidence creates a genuine issue of material fact as to whether the City of Everett's failure to train its police officers on how to deal with mentally disturbed persons or persons under the influence of drugs amounted to a deliberate indifference to constitutional rights.").

B. Under the proper approach, the Fifth Circuit's decision cannot stand.

As the Respondent in *Connick* has pointed out, "the touchstone is awareness." In short, no pattern of prior wrongs need be proved if actual awareness exists. Here, the Fifth Circuit mistakenly required this additional showing of a pattern, which in turn insulated the City from any liability for Omar's death.

Officer Webb's training proposal in this case pointed to the deficient training program—one that had gone awry after its initial implementation. Because he had documented in his official capacity the shortcomings, proof of a pattern of prior wrongs would have been redundant. Even the Fifth Circuit acknowledged that the police chief was aware of the potential for lethal outcomes in mental health-crises due to the lack of training discussed by Officer Webb, but it still insisted upon proof of a pattern of prior unconstitutional acts.

Indeed, *Canton*'s famous footnote 10 is particularly apt in this case. There the Court postulated that a municipality knows that its police officers will be required to arrest fleeing felons, and therefore it is so obvious that they will need to be trained on the constitutional limitations on the use of deadly force that a failure to train them constitutes deliberate indifference. *Canton*, 489 U.S. at 390 n.10. This case mirrors that scenario. If a police department is going to send officers to arrest a mental health consumer, it must train them on the constitutional constraints on use of deadly force on the innocent but mentally ill person. Otherwise, that municipality will be liable under the dictates of *Canton*. Of course, in this case, there was one officer so trained, but she was circumvented, and the four who went into the house were not trained.

The question in this case should have been whether the facts in Webb's proposal had put the City on notice that its training program was deficient and that there was a likelihood that such deficiency would result in a violation of the constitutional rights of its citizens. Since his proposal obviously did that—and both lower

courts acknowledged that—the Valles met their burden of proof.

C. Once *Connick* is decided, this Court should either remand to the Fifth Circuit or grant review to consider failure-to-train claims in the policing context.

If this Court resolves *Connick* and clarifies when proof of a pattern of prior wrongful acts is required, then this case should be remanded to the Fifth Circuit or the trial court with instructions to review the evidence in light of this Court's decision in *Connick*.

Alternatively, this Court should grant review because the case presents the important federal questions of *Connick* in the police context. As just an example of the reach of these particular issues, the City of Houston police department responds to calls of mental-health crises 40 times a day. Pet. App. 24a. But less than 30% of those are answered by CIT-trained officers. The City has contended that its program mirrors those in other large cities. In short, the interaction of municipal police forces with the mentally ill is a burgeoning national problem, and courts are unclear on how to address claims for failure to train. Certiorari should be granted.

II. The Court Should Resolve the Conflicting Approaches to Deciding When Delegation of Power Makes a City Official a "Policymaker" Under *Pembaur*.

A. The circuits employ conflicting approaches to this question.

This Court has explained that municipal liability arises where an official's acts can be said to be those of the municipality:

> [T]he power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Monell*'s language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy" . . . and whose decisions therefore may give rise to municipal liability under § 1983.

Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986). The Court went on to identify the very kind of delegated decision that is involved here:

> To be sure, "official policy" often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time. . . . However, . . . a government frequently *chooses a course of action tailored to a particular situation* and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's

> authorized *decision-makers*, it surely represents an act of official government "policy" as that term is commonly understood.

Id. at 480-81 (emphasis added).

As this Court further noted in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126-27 (1988), it is difficult to define when a city's delegation of authority would constitute artificial insulation from governmental liability for the exercise of that authority. But the Court provided some guidance. First, egregious attempts by municipalities to insulate themselves from liability for unconstitutional practices are precluded where such attempts amount to a widespread practice that constitutes a custom or usage with the force of law. *Id.* Second, if the official's discretionary decision is constrained by policies not of that official's making, those policies, rather than the subordinate's departure from them, are the act of the municipality. *Id.* Similarly, if the official's decision is subject to review by the city's policymakers, they have retained the authority to measure the subordinate's conduct for conformance. *Id.* at 127.

Accordingly, circuits recognize that a city cannot avoid liability by delegating authority to make a discretionary decision. *See, e.g., Kujawski v. Bd. Of Commr's of Bartholomew Cnty.*, 183 F.3d 734, 739, 740 n.4 (7th Cir. 1999) (taking this approach and finding genuine issue of fact as to whether the Board had, as a matter of custom at state law, delegated final policymaking authority with respect to community corrections employees); *Chew v. Gates*, 27 F.3d 1432, 1445 (9th Cir. 1994) ("Los Angeles could not, for example, distance itself from policy regarding the use

of firearms by *de facto* delegating the formulation of firearms policy to the commander of the police academy"); *Myers v. City of Cincinnati*, 14 F.3d 1115, 1118 (6th Cir. 1994) ("A municipality may not escape *Monell* liability . . . by simply delegating decisionmaking authority to a subordinate official and thereafter studiously refusing to review his unconstitutional action on the merits"); *Monistere v. City of Memphis*, 115 Fed. Appx. 845, 2004 WL 2913348, at *5 & n.6, *6 (6th Cir. Dec. 17, 2004) ("In sum, the record clearly supports the conclusion that Embrey's decision was (1) final, (2) not reviewable, and (3) unconstrained by the existing policies and practices of his supervisory officers. . . . [T]his Court concludes that the City's policy of allowing its sergeants unfettered discretion to conduct administrative investigations directly caused the constitutional deprivations that were suffered by these two officers").

B. The proper approach would require reversal of the decision below.

By contrast to those circuits' decisions, the Fifth Circuit employed a mistaken approach in this case, as it concluded that the very policy which delegated authority to Captain Williams, GO 600-05, was the one that constrained his decision. Relying on *Praprotnik*, it held that while Captain Williams may have been the final decisionmaker, he was not the final policymaker for these kinds of arrests because he was constrained by other policies not of his making. Pet. App. 11a, n 4.

Under the proper approach, however, he was a policymaker. First, Williams had unfettered and final authority to make the relevant decisions for handling special threats. The Houston City Charter appointed

the Chief of Police to make all policy regarding arrests. The Chief of Police appointed Captain Williams as the day-to-day final decisionmaker for arrest decisions in difficult circumstances, i.e., barricaded suspects and similar special threats. General Order 600-05 says that the "operational commander will determine which containment and assault tactics to use. . . ." Pet. App. 94a. Similarly, the SOP says that "the captain *will determine whether a full, partial, or no SWAT* response is appropriate." Pet. App. 95a (emphasis added).

Significantly, GO 600-05 required all supervisors and patrol officers in the field to follow its procedure for contacting the Captain of Tactical Operations. It could just as easily have required them to contact the chief of police, but the chief had already delegated these arrest decisions to the captain. This procedure was equivalent to that in *Pembaur* for the sheriff and county attorney: when officers in the field were uncertain as to how to proceed, they were required to contact the sheriff who in turn might refer them to the county attorney. Williams testified that he made these decisions routinely—more than a 114 times during his two years as Captain of Tactical Operations. The City has left no doubt that its practice and policy are to have the Captain of Tactical Operations make and implement the arrest decision in these special-threat situations.

Second, there was no other policy limiting Captain Williams' discretion. As the captain of tactical operations, he determined which assault tactic to use for special threats. The Fifth Circuit did not articulate how he might have deviated from those policies; it appears to have adopted the City's argument that Williams had to call the SWAT (Special Weapons and

Tactics) team into this situation. That position was rejected by a Civil Service Hearing Examiner who found that Williams had complied with these two municipal orders. Pet. App. 4a. The fair reading of these two orders is that the Tactical Operations captain has the final say in choosing and then implementing the proper course of arrest for a barricaded suspect. In making his decision in this case, therefore, Captain Williams was not constrained by any other policies or superior officials. Once he chose not to use a SWAT or HNT team, but instead to use a routine patrol team, he was free from the constraints of GO 600-05 and the SOP 200/1.01.

Other circuits would have reached the opposite conclusion. *See, e.g.*, *Monistere, supra*; and *Feliciano v. City of Cleveland*, 988 F.2d 648, 655 (6th Cir. 1993). If the delegee of authority has the final decision which is not reviewable or constrained by a superior official, then that person's decision constitutes policy for purposes of municipal liability.

C. This is an important federal question arising in § 1983 suits against municipalities.

The authority for such police decisions is almost always delegated by a municipal policymaker to a high-ranking official who has final, discretionary authority. Courts need clarity on how to assess whether that decisionmaking official is a policymaker for purposes of municipal liability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2010

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Opinion, In the United States Court of Appeals for the Fifth Circuit, (July 30, 2010) 1a

Appendix B: Order, In the United States District Court for the Southern District of Texas, Houston Division, (August 24, 2009) 26a

Appendix C: Order, In the United States District Court for the Southern District of Texas, Houston Division, (March 27, 2009) 58a

Appendix D: Order denying rehearing, In the United States Court of Appeals for the Fifth Circuit, (September 15, 2010) 84a

Appendix E: General Order 600-05, Houston Police Department, excerpt (February 17, 1995) 86a

Appendix F: Standard Operating Procedures, Notification Procedures for SWAT Team Response, Houston Police Department, (October 30, 1987) 95a

Appendix G: Crisis Intervention Team, Training Proposal, Houston Police Department, excerpt (December 2004) 97a

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-20624

[Filed July 30, 2010]

JOSE VALLE, Individually and as Representative of the Estate of Omar Esparza; ASUNCION VALLE

Plaintiffs - Appellants

v.

CITY OF HOUSTON,

Defendant - Appellee

Appeal from the United States District Court for the Southern District of Texas

Before JOLLY and GARZA, Circuit Judges and STARRETT*, District Judge. EMILIO M. GARZA, Circuit Judge:

Omar Esparza was shot and killed by Houston police officers during an incident at his family's home. His parents, Plaintiffs-Appellants Jose and Asuncion Valle (the "Valles"), individually and as representatives of their son's estate, sued the City of Houston ("City") seeking relief under 42 U.S.C. § 1983. The district court granted summary judgment in the City's favor on all claims. For the reasons set forth below, we AFFIRM.

I

On the day of the incident, Esparza—who apparently had been suffering from depression and anxiety in the preceding months—became upset and locked himself inside the family home and refused to allow his parents to enter. After about an hour, the Valles called 911 for assistance and requested a Spanish-speaking operator because neither of them spoke English. The Valles apparently hoped that the 911 call would bring medical assistance for their son.

The 911 dispatcher sent police officers to the Valles' home. The Valles allegedly showed the first officer on the scene, Officer Duarte, papers from their previous attempts to get Esparza admitted to a hospital for psychiatric treatment and requested that he help them get medical care for their son. Duarte then approached

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* District Judge of the Southern District of Mississippi, sitting by designation.

the front door of the house and conversed with Esparza (both Duarte and Esparza spoke English). Officers Walsh, Seay, and Chaisson then arrived and spoke with Esparza, who stated he would not come out of the house and would not let anyone in. The officers contacted their supervisor, Sergeant Bryant, who assumed control of the situation upon his arrival. After unsuccessfully attempting to communicate with Esparza, Sergeant Bryant contacted police headquarters to report the situation and seek orders. Captain Williams of the Special Weapons and Tactical/Hostage Negotiation Team ("SWAT") directed Sergeant Bryant to get a Crisis Intervention Team ("CIT") special officer to negotiate with Esparza. CIT Officer Broussard was called to the scene. She negotiated with Esparza for about thirty to forty minutes, but was unable to get him to come out of the house or allow officers into the house. The other non-CIT officers, without consulting Officer Broussard, sought and received permission from Captain Williams to forcefully enter the house. Esparza was not a suspect in any criminal activity, nor had he threatened the officers or himself. Nonetheless, Captain Williams authorized the entry and seizure, although he was neither present at the scene nor had any direct communication with CIT Officer Broussard.

Sergeant Bryant and three other officers armed themselves with a Taser, a shotgun loaded with soft-impact bean bags, and their sidearms. While CIT Officer Broussard was still conversing with Esparza through the front door, Sergeant Bryant and Officers Chaisson, Duarte, and Walsh forcibly entered a side door of the house. The City alleged that Esparza was in possession of a hammer and charged at the officers when they entered. Less than thirty seconds after

entry, the officers began discharging their weapons. Sergeant Bryant fired three blasts of non-lethal soft-impact beanbags from the shotgun he was carrying but was, apparently, unable to stop Esparza. Walsh fired his Taser and missed Esparza. Chaisson then fired his 40-caliber automatic pistol six times at Esparza—three bullets struck him. After the assault subsided, Mrs. Valle entered the home and saw her son lying on the floor; she saw no hammer.[1] Esparza died from his wounds.

SWAT Captain Williams was disciplined by the police department for his role in approving entry into the Valles' home. He successfully appealed his reprimand on the basis that he had acted within the policies and procedures of the police department.

The Valles sued the City[2] pursuant to 42 U.S.C. § 1983, alleging violations of the Fourth and Fourteenth Amendments flowing from the officers' warrantless forcible entry into their home and lethal seizure of Esparza. The Valles alleged that the officers exercised excessive force in entering their home and seizing Esparza pursuant to a City policymaker's orders, and that the City was liable under § 1983 for failure to properly train the officers who entered their home. The district court granted the City's first motion for summary judgment, finding that the decision to

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[1] In its summary judgment opinion, the district court improperly resolved the factual dispute about whether Esparza possessed a hammer in the City's favor. It should have credited Mrs. Valle's testimony that her son did not have a hammer.

[2] The Valles did not sue any of the officers involved in the shooting of their son.

enter the Valles' home was not made by a City policymaker, and thus no City policy was a moving force in causing the Valles' injuries. The district court also granted the City's second motion for summary judgment finding that, although the Valles raised a material fact issue as to the City's failure to train the officers, the Valles failed to show that a city policymaker acted with deliberate indifference and that the allegedly inadequate training was a moving force in bringing about the constitutional violation.

II

We dispose first of the City's claim that the Valles lack standing. The City argues that Esparza may have had a son, which would require administration of Esparza's estate under Texas law, thereby raising a question whether Appellant Jose Valle is the proper party to administer the estate.

We find the City's arguments without merit. Texas law provides that when a person dies intestate, as Esparza did, the decedent's estate immediately vests in his heirs at law, subject to the payment of any debts of the estate. TEX. PROB. CODE ANN. § 37. Title to any estate passes equally to the decedent's parents in the absence of a spouse or children. *Id.* at § 38(a)(2), (b)(2). Administration of the estate is necessary if "two or more debts exist against the estate." *Id.* at § 178(b). As required, the Valles submitted evidence demonstrating that an estate administration was neither pending nor necessary. *See Shepherd v. Ledford*, 962 S.W.2d 28, 31–32 (Tex. 1998) (holding that heirs at law may maintain a wrongful death or survival suit without administration of the estate if they allege and prove that there is no administration pending and none

necessary). Even if Esparza did have a son, a point that the parties contest, the Valles still have standing under Texas law to recover wrongful death damages on behalf of themselves and all others entitled to recover under the wrongful death statute. TEX. CIV. PRAC. & REM. CODE ANN. § 71.004(b). The City's conclusory allegation that Esparza's estate requires administration is insufficient. Accordingly, the district court's determination that the Valles have standing to sue was correct.

III

This court reviews a grant of summary judgment de novo. *Mack v. City of Abilene*, 461 F.3d 547, 555 (5th Cir. 2006) (citing *Morris v. Dillard Dep't Stores*, 277 F.3d 743, 747 (5th Cir. 2001)). Summary judgment is appropriate only if no genuine issue of material fact exists. FED. R. CIV. P. 56. All facts and inferences are construed in the light most favorable to the non-moving party. *Murray v. Earle*, 405 F.3d 278, 284 (5th Cir. 2005).

IV

A

The Valles argue that the City is liable for entering their home in violation of the Fourth Amendment and for using excessive force to seize their son, which resulted in his death. The Valles assert that Captain Williams was acting as the City's final policymaker with respect to arrests and seizures when he authorized entry into the Valles' home, and thus his actions constitute City policy for the seizure at issue here.

It is well established that a city is not liable under § 1983 on the theory of respondeat superior. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). A municipality is liable only for acts directly attributable to it "through some official action or imprimatur." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). To establish municipal liability under § 1983, a plaintiff must show the deprivation of a federally protected right caused by action taken "pursuant to an official municipal policy." *See Monell*, 436 U.S. at 691. A plaintiff must identify: "(1) an official policy (or custom), of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy or custom." *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002) (citing *Piotrowski*, 237 F.3d at 578).

The existence of a policy can be shown through evidence of an actual policy, regulation, or decision that is officially adopted and promulgated by lawmakers or others with policymaking authority. *Burge v. St. Tammany Parish*, 336 F.3d 363, 369 (5th Cir. 2003). "[A] single decision by a policy maker may, under certain circumstances, constitute a policy for which a [municipality] may be liable." *Brown v. Bryan County*, 219 F.3d 450, 462 (5th Cir. 2000). However, this "single incident exception" is extremely narrow and gives rise to municipal liability only if the municipal actor is a final policymaker. *Bolton v. City of Dallas*, 541 F.3d 545, 548 (5th Cir. 2008) (citing *Woodard v. Andrus*, 419 F.3d 348, 352 (5th Cir. 2005)).

Under the second prong, "[a]ctual or constructive knowledge of [a] custom must be attributable to the governing body of the municipality or to an official to

whom that body has delegated policy-making authority." *Webster v. City of Houston*, 735 F.2d 838, 842 (5th Cir. 1984) (en banc); *see also Piotrowski*, 237 F.3d at 579. This circuit has long distinguished between final decisionmaking authority and final policymaking authority. *See Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1247 (5th Cir. 1993) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.12 (1986) and *Praprotnik*, 485 U.S. at 130). A municipal policymaker is someone who has "the responsibility for making law or setting policy in any given area of a local government's business." *City of St. Louis v. Praprotnik*, 485 U.S.112, 125 (1988). "Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur*, 475 U.S. at 481. Whether an official possesses final policymaking authority for purposes of municipal liability is a question of state and local law. *Id.* at 482.

The third prong requires a plaintiff to prove "moving force" causation. To succeed, "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 404 (1997). That is, "the plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." *Id.* at 411. Deliberate indifference is a high standard—"a showing of simple or even heightened negligence will not suffice." *Piotrowski*, 237 F.3d at 579 (quoting *Brown*, 520 U.S. at 407).

The Valles do not argue that the City has a formal written policy or custom that caused the unconstitutional seizure of their son.[3] Instead, they contend that the City is liable for Captain Williams's single unconstitutional decision to order entry into their home to seize their son. To succeed on this claim, the Valles must show that Captain Williams had final policymaking authority and that his decision was the moving force behind the constitutional injury. The Valles appear to argue that some lesser "decisionmaking" authority to make the one-time decision at issue is sufficient. *See Pembaur*, 475 U.S. at 481 ("If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood."). This argument is based on a misunderstanding of *Pembaur* and this circuit's precedent. *See Bolton*, 541 F.3d at 548–50 (discussing the distinction between final decisionmaking authority and final policymaking authority and noting that a municipality may only be liable for a decision of a final policymaker). We have long recognized that the "discretion to exercise a particular function does not necessarily entail final policymaking authority over that function." *Bolton*, 541 F.3d at 549 (citing

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[3] The only formal policy referred to by the parties is the police department's General Order ("GO") 600-05, which defines the appropriate course of action for SWAT officers to follow in special threat situations (*i.e.*, a barricaded suspect). The district court determined that this policy was neither unlawful nor the moving force behind the alleged constitutional violations. Indeed, Captain Williams was reprimanded for ordering the forceful entry of the Valles' home because that decision was found to be a violation of GO 600-05.

Praprotnik, 485 U.S. at 130; *Pembaur*, 475 U.S. at 483–84); *Jett*, 7 F.3d at 1247.

Under Chapter 34 of the City Code of Ordinances, the Chief of Police may delegate authority to another and such person "so designated shall be vested with the full authority of the office of chief of police." HOUSTON, TEX. CODE OF ORDINANCES §§ 34-24. The Valles contend that the Chief of Police exercised his policymaking authority in promulgating GO 600-05, which delegates the Chief's full policymaking authority to the Assistant Chief of Police for Tactical Operations and to the Captain of Tactical Operations—here, Captain Williams. They further argue that Special Operating Procedure ("SOP") 200/1.01 specifically designated the Captain of Tactical Operations as the person responsible for determining how to implement GO 600-05. In particular, SOP 200/1.01 states that the Captain of Tactical Operations shall be contacted regarding a special threat situation and "will determine whether a full, partial or no SWAT response is appropriate." The Valles contend that when a decision is made under GO 600-05 and SOP 200/1.01 about how to handle a special threat situation, the person who makes that decision is "making policy for the specific arrest" because the designated decisionmaker is exercising authority delegated by the chief of police who is the final policymaker for arrest decisions.

Although GO 600-05 and SOP 200/1.01 confer decisionmaking or operational command authority on Captain Williams, it does not follow that Captain Williams, or another person to whom such authority is delegated, acts in a policymaking capacity. Captain Williams was afforded a certain measure of discretion

in carrying out the City's policy. But "[w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Praprotnik*, 485 U.S. at 127. The Valles do not contend that either GO 600-05 or SOP 200/1.01 were policies made by Captain Williams pursuant to delegated policymaking authority. Rather, they are policies made by other officials that Williams was required to follow. Assuming that Captain Williams was delegated some level of decisionmaking authority, GO 600-05 and SOP 200/1.01 constrained his authority and set forth the range of choices which he could make in a given situation. The fact that Captain Williams made the final decision in this situation does not mean that he was setting City policy regarding the making of arrests.[4] Nor does the fact that Captain Williams's decision violated Esparza's right to be free of an

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[4] The Valles argue that because the "City's rules, orders, and policies point to [Captain] Williams to make the decision and gave him this authority to do so – a straight delegation from the chief," it follows that Captain Williams's decision to tell the officers to forcefully enter the Valles' home was "the City's policy for that arrest." If this argument were correct, then a municipality could be liable for almost any decision of its employees that resulted in a constitutional violation because the unconstitutional decision could be said to be the policy for that particular decision. Such a theory of liability has been soundly rejected. *See, e.g.*, *Praprotnik*, 485 U.S. at 126 ("If the mere exercise of discretion by an employee could give rise to [liability for] a constitutional violation, the result would be indistinguishable from respondeat superior liability.").

unconstitutional seizure elevate his decision to one attributable to the municipality.[5]

Although Captain Williams's decision to order entry into the home was arguably the "moving force" behind the constitutional violations that resulted in Esparza's death, because his decision was not a decision by a final policymaker of the City, the City cannot be liable. Thus, the district court properly granted summary judgment on the Valles' municipal liability claim against the City.

B

The Valles also argue that the City is liable because it failed to adequately train its patrol supervisors in the use of CIT tactics. As a result, the Valles contend that the CIT officer on the scene at their home was overruled by a non-CIT-trained supervisor, which resulted in immediate and lethal escalation of the situation, an outcome that CIT training was intended to prevent.

The standard applicable to a failure-to-train claim is the same as the standard for municipal liability. *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005). "The failure to provide proper training may fairly be said to represent a policy for which the city is

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[5] The Valles contend for the first time in their reply brief that even if Captain Williams's decision to order entry of their home was not an exercise of policymaking authority, the City is nonetheless liable for that decision because it ratified Williams's unconstitutional actions. The Valles have waived this argument by failing to raise it in their opening brief. *See, e.g.*, *Tharling v. City of Port Lavaca*, 329 F.3d 422, 430 (5th Cir. 2003).

responsible, and for which the city may be held liable if it actually causes injury." *Bryan County*, 219 F.3d at 457 (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)). "In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform." *City of Canton*, 489 U.S. at 390. A plaintiff must show that (1) the municipality's training policy or procedure was inadequate; (2) the inadequate training policy was a "moving force" in causing violation of the plaintiff's rights; and (3) the municipality was deliberately indifferent in adopting its training policy. *See, e.g.*, *Sanders-Burns v. City of Plano*, 594 F.3d 366, 381 (5th Cir. 2010); *Pineda*, 291 F.3d at 332.

1

To show that the City's training was inadequate, the Valles presented evidence that the City chose not to implement a 2004 proposal for additional mandatory CIT training, prepared at the direction of the Executive Assistant Chief of Police. According to the proposal, CIT training is "a proven curriculum for helping officers safely de-escalate situations involving individuals in serious mental health crises." The 2004 proposal made two recommendations relevant here: (1) that *all* patrol officers be required to complete twenty-four hours of CIT training, and (2) that all patrol *sergeants* be required to complete CIT training.

The first proposal was intended to address the underutilization of CIT officers. Lieutenant Mike Lee, of the police department's Mental Health Unit, testified that CIT training gives officers a basic understanding of mental health issues and appropriate

de-escalation and communication tactics. Yet, the proposal noted that CIT-trained officers only handled thirty percent of CIT calls. It also noted the potential liability that could flow from officers not trained in proper de-escalation tactics responding to volatile situations. The proposal specifically noted: "If we dispatch a non-CIT officer to a CIT call and the officer shoots and kills the mental health consumer, the community will ask why we didn't use a CIT officer. We could be liable if a CIT officer was available but not used."

The second recommendation was intended to preclude possible conflicts that could arise between a lower-ranked CIT-trained officer and a higher-ranked non-CIT-trained officer that might result in the higher-ranked officer "overcalling" the CIT officer's suggested approach to the situation. Lieutenant Lee described CIT training as "180 degrees different than . . . typical police officer and law enforcement training." For instance, situations involving mentally ill persons require a greater degree of patience and can require use of CIT tactics for periods as long as twenty-four hours. CIT-trained officers are trained not to "let the pressure of time be a factor in [their] decisionmaking." Supervisors, such as Sergeant Bryant, are supposed to "allow CIT officers to do their jobs with the least amount of interference possible," but "ultimate control" nonetheless rests with the supervisor, not a junior CIT-trained officer. Thus Lieutenant Lee recommended that the City either allow the CIT-trained officer—even if lower ranked—to be in charge of a scene involving a mentally ill person or train all supervisors to a level equal to that of the junior CIT officers so that conflicts would be less likely to occur. The Assistant Chief and Chief of Police

considered the proposals but decided not to implement either.[6]

We agree with the district court that the Valles presented sufficient summary judgment evidence to raise a jury question whether the department's decision not to implement the CIT training recommendations in the 2004 proposal constituted an official policy of failing to adequately train. The Valles also raised a factual question whether a City policymaker (*i.e.*, the Chief of Police) had actual or constructive knowledge of the alleged inadequacy. The 2004 proposal suggests that the City recognized that mental health situations were not being adequately dealt with by CIT-trained officers and that there was a need for additional CIT training. The proposal recommends a course of action, but the City declined to implement those recommendations. The City points to evidence that the Chief of Police and Executive Assistant Chief had to balance the need for training with practical considerations such as budgetary and time constraints, and that instead of adopting the proposal, the City attempted to identify CIT-trained officers for dispatch purposes to increase the percentage of CIT calls actually handled by CIT officers. Although this evidence suggests that the City did not completely ignore the issues raised by the 2004 proposal and sought other ways to deal with them, it highlights the factual dispute whether the City's

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[6] The district court determined that the Chief of Police and Executive Assistant's decision not to implement the proposal was an official policymaking decision. The City does not contest this finding.

training and its response to the proposal were inadequate.

2

As to the second requirement for municipal liability, the district court found insufficient evidence of causation to survive summary judgment. Plaintiffs must meet a heightened standard of causation in order to hold a municipality liable under § 1983. *See City of Canton*, 489 U.S. at 391–92. Thus, we require that the municipality's failure to train be the "moving force" that caused the specific constitutional violation. *Bryan County*, 219 F.3d at 461. In other words, the plaintiff must establish a "direct causal link" between the municipal policy and the constitutional injury. *Brown*, 520 U.S. at 404. "We have said that the connection must be more than a mere 'but for' coupling between cause and effect. The deficiency in training must be the actual cause of the constitutional violation." *Thompson v. Connick*, 578 F.3d 293, 300 (5th Cir. 2009), *cert. granted*, – S. Ct. –, 2010 WL 1005953 (U.S. Mar. 22, 2010) (No. 09-571) (internal quotations and citations omitted).

The Valles have failed to present sufficient evidence of causation as to the entry of their home. That decision was made by Captain Williams, the head of the tactical SWAT team, who was trained in CIT tactics. Moreover, although CIT Officer Broussard testified that she was neither told nor consulted about making entry into the home, she further testified that she did not disagree with the decision to enter. While we are troubled that Captain Williams never spoke directly with the only CIT officer on the scene prior to ordering the forceful entry of the Valles' home, any

alleged lack of CIT training was not the "moving force" in the decision to enter the home.

However, we find that there is sufficient evidence of causation to survive summary judgment with respect to the escalation of force after the officers' entry. The district court reasoned that because CIT Officer Broussard was on the scene, the first goal of the 2004 training proposal—to increase the use of CIT officers in situations such as involved in this case—was accomplished even though that 2004 policy had not been implemented. Although Officer Broussard was present, she was not one of the officers who entered the Valles' home. Moreover, there is no record evidence that the officers who did enter the Valles' home had received any CIT training. Lieutenant Lee emphasized that CIT training is "180 degrees different" from standard patrol officer training and agreed that the "command techniques that are employed to take a criminal suspect into custody can . . . serve to escalate contact with the mentally ill into violence." Furthermore, Assistant Chief Michael Dirden, at the time responsible for internal investigations, testified that he had concerns that the officers who handled the situation were not adequately prepared to do so. In addition, the Valles' expert opined that "there is a substantially greater likelihood that [Esparza] would [have] survive[d] if the officers going in there are the very best trained, best equipped, best prepared to deal with any kind of eventuality." On the other hand, the City presented some testimony to the effect that CIT training may not have changed the outcome and that Esparza's death was not an incident that would have been addressed by implementation of the 2004 training proposal. At best, the City's evidence raises a factual dispute whether failure to train all of

the patrol officers involved in the incident in CIT tactics was a moving force in the precipitous escalation of force following their entry, which violated Esparza's constitutional rights.

3

The district court also found that the Valles failed to raise a genuine issue of material fact on the deliberate indifference prong. Although we find this a closer question than the district court apparently did, we ultimately conclude that the Valles did not present evidence sufficient to survive summary judgment. "Deliberate indifference is a stringent standard, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bryan County*, 219 F.3d at 457 (quoting *Brown*, 520 U.S. at 410) (internal quotation marks omitted). Deliberate indifference is more than negligence or even gross negligence. *See Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005) (citation omitted). The Valles must show that "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390. Usually a plaintiff must show a pattern of similar violations, and in the case of an excessive force claim, as here, the prior act must have involved injury to a third party. *See Sanders-Burns*, 594 F.3d at 381.

The Valles presented some evidence that the City's decision not to implement the 2004 CIT training proposal could potentially lead to the deprivation of

constitutional rights. Contrary to the district court's findings, we think that the 2004 proposal was, at least in part, intended to address the potential for the unconstitutional use of excessive force against mentally ill persons. Although the proposal does not explicitly state that it was intended to prevent constitutional violations, we think the use of "magic words" denoting that a policy is intended to address constitutional violations or § 1983 liability are unnecessary.[7] The 2004 training proposal shows that City policymakers were aware that the CIT program was being significantly underutilized, even though it was "proven . . . for helping officers safely de-escalate situations involving individuals in serious mental health crises." The proposal explicitly acknowledged potential liability (albeit without referencing § 1983) arising from not using CIT officers in situations that called for CIT tactics. Furthermore, it specifically referenced an example of a non-CIT officer shooting and killing a mentally ill person, a factually similar situation to that here, and specifically referenced liability for failure to train. The reasonable inference from the proposal's discussion of these liability issues is that the City was concerned about the potential for excessive force liability, even though no explicit mention of "constitutional violations" was made. Thus, in our view, the proposal tends to show that City

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[7] Requiring that a training proposal include explicit reference to the potential for constitutional violations or § 1983 liability in order to hold a municipality liable for failing to implement such a proposal would have perverse consequences. If such a rule existed, municipalities could very simply shield themselves from liability by couching training proposals in ambiguous language or otherwise excluding explicit discussion of the potential constitutional injury that the proposal is intended to address.

officials were aware of the potential for constitutional violations in situations involving mentally ill persons.

However, the Valles did not link this *potential* for constitutional violations to a pattern of actual violations sufficient to show deliberate indifference. The proposal does not detail any prior specific instances of the use of excessive force by non-CIT officers. Nor did the Valles elicit testimony that City officials were aware of prior shootings of unarmed mentally ill individuals. The Valles did present some testimony showing that an assistant police chief was, at least, vaguely aware of two shootings of mentally ill persons that occurred *after* Esparza was killed. However, even assuming that these later shootings involved excessive force, they are not sufficient to show that the City was on notice of similar constitutional violations *before* Esparza was killed. *See Davis*, 406 F.3d at 383 (holding that the deliberate indifference standard requires showing "that the failure to train reflects a *deliberate* or *conscious* choice to endanger constitutional rights" (emphases added)). Furthermore, although the 2004 proposal noted that more than 70 percent of all CIT calls were cleared by non-CIT officers, that statistic says nothing about a pattern of constitutional violations because the mere fact of non-CIT officers responding to CIT calls is not itself a violation of any constitutional right. The Valles cannot show a pattern of excessive force without some link between that statistic and specific instances where such a response resulted in constitutional violations. The Valles' expert's testimony, based on two Houston Chronicle articles pre-dating Esparza's shooting, that "[a]t least 10 mentally ill people shot [by Houston officers] were unarmed or carrying objects such as screwdrivers or pieces of wood," is also

insufficient. This testimony does tend to suggest that prior shootings of mentally ill persons in fact had occurred, but it does not establish a pattern of constitutional violations. Prior instances must point to the specific violation in question; "notice of a pattern of *similar* violations is required." *Id.* Although it is possible to infer that these prior shootings may have involved the use of excessive force, that inference is too tenuous to survive summary judgment. For one, a police officer may be justified in using lethal force against a person carrying a screwdriver or other object, depending on the circumstances. *See Ballard v. Burton*, 444 F.3d 391, 402 (5th Cir. 2006) (citing *Mace v. City of Palestine*, 333 F.3d 621, 624 (5th Cir. 2003)) ("Use of deadly force is not unreasonable when an officer would have reason to believe that the suspect poses a threat of serious harm to the officer or others."). Some greater level of detail about these prior shootings is required. *See Davis*, 406 F.3d at 383 ("Prior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question.") (citations omitted).

We further note that it is difficult to show deliberate indifference in a case such as this one where the City has implemented at least some training. The very fact that the City trained a corps of officers in CIT tactics, demonstrates that it was not deliberately indifferent to the dangers of police interactions with mentally ill residents. The City considered the proposal, as well as resource constraints, and determined that the best allocation of limited resources and personnel was to keep the CIT training at the then-current levels. We do not mean to say that anytime a municipality must make decisions about resource allocations, such a decision will preclude a

finding of deliberate indifference. Indeed, we can imagine scenarios in which a municipality's decision not to allocate resources to training necessary to prevent constitutional violations would constitute deliberate indifference. But that is not the case before us. As we indicated in the discussion of causation, additional training both in terms of the number of officers who were so trained and the quantity of training that each officer received may have made a difference for Esparza. But without a demonstrated link showing constitutional violations, notwithstanding the level of training the City had already implemented, we cannot say that the City was deliberately indifferent.

Nor did the Valles present sufficient summary judgment evidence to succeed in showing deliberate indifference under the single incident exception. Proof of deliberate indifference is difficult, although not impossible, to base on a single incident. *Sanders-Burns*, 594 F.3d at 381. The "single incident exception" is extremely narrow; "a plaintiff must prove that the *highly predictable consequence* of a failure to train would result in the specific injury suffered, and that the failure to train represented the moving force behind the constitutional violation." *Id.* (citations and internal quotations omitted) (emphasis added). In the one case in which we found a single incident sufficient to support municipal liability, there was an abundance of evidence about the proclivities of the particular officer involved in the use of excessive force. *See Bryan County*, 219 F.3d at 462 (finding deliberate indifference based on the police officer's known "personal record of recklessness and questionable judgment," inexperience, exuberance, and involvement in forcible arrest situations). On the other hand, we

have rejected claims of deliberate indifference even where a municipal employer knew of a particular officer's propensities for violence or recklessness. *See, e.g.*, *Davis*, 406 F.3d at 382–85 (finding no deliberate indifference even though city was aware that officer fired weapon inappropriately, had a propensity for violence, and had received citizen complaints about the officer); *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir. 1998) (rejecting claim of deliberate indifference even though evidence showed officer was extremely stressed, may have had a quick temper, and was aggressive). This court has been wary of finding municipal liability on the basis of a single incident to avoid running afoul of the Supreme Court's consistent rejection of respondeat superior liability. *See, e.g.*, *Pineda*, 291 F.3d at 334–35 (noting that the court rarely finds municipal liability for a failure to train claim on the basis of a single incident).

Here, the Valles did not allege or offer evidence that the officers who responded to their call had a propensity for using excessive force, violence, or were otherwise reckless. Our case law does not specifically require evidence of such character traits, but such evidence certainly is probative in determining that a "highly predictable" consequence of sending the particular officers into a particular situation would be a constitutional violation. Rather, the Valles attempted to show that a "highly predictable" consequence of sending non-CIT officers to a situation involving a mental health consumer would be an unconstitutional use of excessive force. "The single incident exception requires proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights and the need for additional or different police training." *Gabriel v. City*

of Plano, 202 F.3d 741, 745 (5th Cir. 2000) (citing *Brown*, 520 U.S. at 409).

Although the evidence shows the possibility—perhaps even the likelihood—of recurring situations involving mental health consumers, the evidence is far more equivocal on the question whether there was an obvious potential for the violation of constitutional rights and an obvious need for more or different training. The Valles presented evidence that in the three years preceding Esparza's shooting, Houston police received approximately forty calls per day involving situations in which CIT tactics would be appropriate. Less than thirty percent of those calls were actually answered by CIT-trained officers. Coupled with Lieutenant Lee's testimony that general patrol training is "180 degrees different" from CIT training, these figures suggest that it was, if not obvious that more CIT training was necessary, at least an issue on the City's radar. However, as discussed above, the Valles did not produce evidence to meet the high hurdle of showing that excessive force was an obvious consequence of non-CIT officers responding to CIT situations. Indeed, in considering the single-incident exception, "[s]everal panels of this court . . . have reviewed cases where a decision not to train was made long before the alleged violation, and found that the lack of any similar violations indicates that a violation could not be the 'highly predictable consequence' of failing to train." *Thompson*, 578 F.3d at 299 (citations omitted). "This approach reflects common sense: if there have been thousands of opportunities for municipal employees to violate citizens' constitutional rights, and yet there have been no previous violations, then the need for training is simply not 'so obvious.'" *Id.* at 299–300; *see also*

Conner v. Travis County, 209 F.3d 794, 797 (5th Cir. 2000) (holding that if failure to train was "so likely to result in the violation of constitutional rights," the plaintiff "would be able to identify other instances of harm arising from the failure to train"). We find the actions and decisions of the officers involved in this unfortunate shooting to be very troubling, indeed. However, the Valles did not present sufficient evidence to show that the *highly predictable consequence* of sending non-CIT officers in response to their call for help would result in the shooting of their son.

V

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in the City's favor.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-07-2439

[Filed August 24, 2009]

JOSE VALLE, INDIVIDUALLY and as REPRESENTATIVE OF THE ESTATE OF OMAR ESPARZA, and ASUNCION VALLE, Plaintiffs,	)
versus	)
CITY OF HOUSTON, Defendant.	)

ORDER

Pending before the Court is Defendant City of Houston's Motion for Summary Judgment on Plaintiffs' Failure to Train Claim. (Instrument No. 70).

I.

A.

Plaintiffs Jose Valle and Asuncion Valle ("Plaintiffs"), individually and as representatives of the estate of Omar Esparza ("Esparza"), deceased, bring the instant suit against Defendant, the City of Houston ("Defendant" or "City"). (Instrument No. 56). The case arose after the fatal shooting of Esparza, Plaintiffs' son, by City of Houston police officers. (*Id.*, at 6-7). Plaintiffs seek relief pursuant to 12 U.S.C. § 1983 ("Section 1983 ") for alleged violations of the Fourth and Fourteenth Amendments. (*Id.*). Plaintiffs allege that the City is liable for Esparza's death because it failed to train the four officers who entered the Valles' home. (*Id.*).

B.

On Sunday, January 7, 2007, Esparza, Plaintiffs' 21-year old son, was fatally shot by City of Houston police officers in his home at 5018 Curtain Street, Houston, Texas. (*Id.*, at 2). The circumstances leading up to Esparza's death are as follows:

Plaintiffs allege that during the last several months of 2006, Esparza had been acting in an unusual manner and expressed signs of depression, anxiety and confusion. (*Id.*). His parents had sought psychiatric treatment for him through the Harris County Hospital District in Houston, Texas, but Esparza had not been accepted for treatment as of the date of the incident at issue. (*Id.*).

On Sunday, January 7, 2007, Esparza and his family went to a nearby McDonald restaurant to pick up food for lunch. (*Id.*). On their way home, Esparza become upset regarding the food and told his family members that the food was all his. (*Id.*). Once they arrived at their home, Esparza went inside and locked his family out. (*Id.*). After standing outside their home for over one hour, Plaintiffs called 911 for assistance and requested a Spanish-speaking operator because neither of them spoke English. (*Id.*, at 2-3; Instrument No. 36, at 6). Plaintiffs allege that in calling 911, it was their hope that emergency medical technicians would come to their house and take Esparza to Ben Taub Hospital for treatment. (Instrument No. 56, at 3).

The Harris County 911 dispatcher sent Houston Police Department ("HPD") officers to Plaintiffs' home in response to their call. (*Id.*). The first officer to arrive at the scene was Officer J. Duarte. (*Id.*). Plaintiffs allege that they showed Officer Duarte admission papers from Ben Taub Hospital, and through gestures and their daughter's assistance, asked his help in caring for Esparza. (*Id.*). Officer Duarte went to the front door of the home and began a dialogue with Esparza through the door. (*Id.*). Esparza spoke English and was able to communicate with the Officer Duarte. (*Id.*).

Sometime thereafter, HPD Officer S. Walsh arrived at the home and also participated in the conversation with Esparza at the front door of the house. (*Id.*). Then, HPD Officers J.D. Seay and Rodney Chaisson, Jr. arrived. (*Id.*). The officers conversed with Esparza for over thirty minutes, but Esparza stated that he was not going to come out of the house and he was not

going to allow the officers inside. (Instrument No. 36, at 7).

Finally, HPD Sergeant A.R. Bryant arrived at Plaintiffs' home and assumed control of the scene outside the house. (Instrument No. 56, at 3). He established communication with HPD Headquarters to report the situation and to seek orders. (*Id.*). He was put in touch with Captain David Williams of the Special Weapons and Tactical/Hostage Negotiation Team ("SWAT"/"HNT"). (*Id.*). Captain Williams directed Sergeant Bryant to get a Crisis Intervention Team ("CIT") trained specialist officer to the scene to conduct negotiations with Esparza, and Sergeant Bryant got Officer Callandra Broussard, a trained CIT specialist, to come to the scene. (*Id.*, at 3-4).

Upon her arrival at the scene, Officer Broussard extracted a shotgun from the trunk of her car and proffered it to Sergeant Bryant. (*Id.*). She then commenced negotiations with Esparza but was unable to make significant progress. (*Id.*).

Sergeant Bryant spoke with Captain Williams on the telephone again, and Captain Williams authorized Sergeant Bryant to form an entry team and make entry into the home. (*Id.*; Instrument No. 36, at 8). Sergeant Bryant called the other officers together near his vehicle to discuss these further orders he had received from Captain Williams. (Instrument No. 56, at 3). Sergeant Bryant and three other officers prepared to enter the home and began arming themselves with a taser weapon, a soft-impact weapon, and their sidearms. (*Id.*). Upon seeing the officers prepare for the entry, Plaintiff Jose Valle approached them and asked that they not shoot his son. (*Id.*).

Officer Duarte, through gestures and limited conversation, allegedly assured Jose Valle that "everything would be okay." (*Id.*).

At approximately 5:21 p.m., Sergeant Bryant led an assault team of three other officers into the side door on the northeast corner of Plaintiffs' home, with the approval of Captain Williams. (*Id.*; Instrument No. 36, at 9). During the entry, Officer Chaisson was wearing an assault helmet. (Instrument No. 56, at 3). Officer Duarte was armed with a pistol, Officer Walsh was armed with a pistol and a taser gun, and Officer Chaisson was armed with a 40 caliber automatic pistol. (*Id.*). Sergeant Bryant was armed with his pistol and Officer Broussard's shotgun loaded with non-lethal soft-impact beanbags. (*Id.*).

According to Defendant, Esparza was in possession of a hammer in his right hand and charged at the officers with the hammer raised. (Instrument No. 29, at 6). The officers began discharging their weapons less than thirty seconds after entering the home. (Instrument No. 56, at 4). Sergeant Brant fired three blasts from the shotgun, which contained non-lethal soft-impact beanbags, but was unable to stop Esparza's movement. (*Id.*, at 5; Instrument No. 29, at 6). Officer Walsh fired his taser gun and missed Esparza. (*Id.*). Then Officer Chaisson fired his 40 caliber automatic pistol six times at Esparza - three bullets missed Esparza but three bullets hit him (*Id.*).

After the gunfire subsided, Plaintiff Asuncion Valle asserts that she ran through the front door of her home, into the living room to the doorway into the den, and saw her son lying on his back on the floor. (Instrument No. 56, at 5). Plaintiffs claim that she ran

to Esparza, but was pulled away by Officer Duarte and Officer Broussard, who had followed her into the home. (*Id.*). According to Plaintiffs, Esparza was still breathing when Asuncion Valle was pulled away. (*Id.*). Asuncion Valle claims that she did not see a hammer in the room where Esparza had been shot. (Instrument No. 36, at 10). Officer Broussard allegedly took control of the hammer and threw it outside on the front lawn of the Valles' home. (*Id.*, at 11; Instrument No. 36-15).

Following the incident, Captain Williams of SWAT/HNT was disciplined by HPD for violations of its policies relating to entry. (Instrument No. 29, at 6). Captain Williams appealed the reprimand. (Instrument No. 36, at 11; Instrument No. 36-16, at 2). On appeal, Civil Service Grievance Examiner Ana Cummings reversed the reprimand and found that Captain Williams had acted within the policies and procedures of the HPD. (*Id.*).

C.

Plaintiffs filed suit against Defendant City of Houston on July 26, 2007. (Instrument No. 1). Plaintiffs allege that the City is liable for violations of the Fourth and Fourteenth Amendments. Plaintiffs averred that HPD Officers made a warrantless forcible entry into their home and made a lethal attempt to seize Esparza, which constituted an unreasonable search and seizure. (*Id.*, at 5-6). Plaintiffs further contended that the HPD officers acted under the orders of the Tactical Operations Commander, a policymaker for the City of Houston, and that their actions constituted excessive force. (*Id.*, at 6-7). Finally, Plaintiffs alleged that the HPD officers who entered their home negligently deployed a taser gun

when they seized Esparza, in violation of Chapter 101 of the Texas Civil Practices & Remedies Code ("TCPRC"). (*Id.*, at 9). Plaintiffs contended that the negligence of these officers in their official capacity was a proximate cause of Esparza's death. (*Id.*).

Defendant City of Houston filed its first motion for summary judgment on July 30, 2008. (Instrument No. 29). Defendant argued that Plaintiffs' constitutional claims against it must be dismissed because Plaintiffs cannot establish that an official policy or custom, made by a policymaker for the City, was a moving force behind the alleged unlawful entry or the alleged excessive force. (*Id.*, at 9-21). Defendant further argued that Plaintiffs cannot establish that the HPD officers acted negligently, or that any negligent action caused Esparza's death. (*Id.*, at 21-23). Finally, Defendant asserted that Plaintiffs lack standing to bring the instant suit because the evidence indicates that Esparza may have had a son and administration of his estate may be necessary. (*Id.*, at 24).

Plaintiffs responded in opposition to Defendant's motion for summary judgment on August 24, 2008. (Instrument No. 36). Plaintiffs asserted that Captain Williams served as a policymaker for the City, as he was the Captain of the Tactical Operations team and was the person designated by the City to handle similar arrest situations. (*Id.*, at 15-17). Plaintiffs also contended that Captain Williams's decision "to send an assault team into the Valles' home" was a moving force in causing the assault team to unconstitutionally enter their home and unconstitutionally seize Esparza by lethal force. (*Id.*, at 12-13, 18-21). Plaintiffs averred that the officers who entered the Valles' home negligently used their weapons and are thus liable

under Texas law. (*Id.*, at 21-23). Finally, Plaintiffs claimed that they have standing to bring the instant suit because there is no evidence that Esparza had any heirs except for them (*Id.*, at 24-25).

Defendant City of Houston replied on September 5, 2008. (Instrument No. 43). Defendants disputed that Captain Williams was a policymaker for the City, and maintained that "Capt. William's single decision to allow entry" fails to establish a municipal policy or custom. (*Id.*, at 2-4). Defendant further claimed that Plaintiffs failed to demonstrate that the officers' use of weapons was negligent. (*Id.*, at 4-5).

The Court granted Defendant's first motion for summary judgment on March 27, 2009. (Instrument No. 67).

Plaintiffs amended their Complaint on October 22, 2008, after the filing of Defendant's first Motion for Summary Judgment, to assert an additional claim for failure to train. (Instrument No. 56). Plaintiffs assert that Defendant is liable under 42 U.S.C. § 1983 "for its failure to train the four officers who entered the Valles' home." (*Id.*, at 7). Specifically, Plaintiffs claim that the "officers led by Sgt. Bryant had received no training for making such an entry into a private residence to seize a person suffering from mental illness." (*Id.*, at 8). Plaintiffs' failure to train claim is the only claim currently before the Court.

On April 1, 2009, Defendant City of Houston timely filed the instant second motion for summary judgment addressing Plaintiffs' failure to train claim. (Instrument No. 70). Defendant argues that there is no genuine issue of material fact regarding Plaintiffs'

failure to train claim. (*Id.*, at 3). Defendant avers that no evidence shows that the City's training was inadequate or that a policymaker was deliberately indifferent in adopting training policies. (*Id.*, at 7-11). Defendant further claims that there is no evidence demonstrating that the alleged lack of training was the moving force behind Esparza's death. (*Id.*, at 11-12).

Plaintiffs filed a response to Defendant's motion for summary judgment on June 8, 2009. (Instrument No. 83). Plaintiffs assert that the City's CIT training program was deficient and ineffective. (*Id.*, at 12-14). Plaintiffs further claim that City of Houston policymakers - including Chief of Police Hurtt and Executive Assistant Chief Oettmeier - were deliberately indifferent to the deficiencies in the training program. (*Id.*, at 14-15). Plaintiffs argue that Defendant's failure to adequately train officers in CIT was the moving force behind Esparza's death. (*Id.*, at 15-17).

Defendant filed a reply to Plaintiffs' response on June 10, 2009. (Instrument No. 89). Defendant reiterates its arguments that the City's CIT training program was adequate at the time of the shooting. (*Id.*, at 2-3). Defendant claims that Plaintiffs have offered no evidence of deliberate indifference by a policymaker with respect to the training program. (*Id.*, at 3). Finally, Defendant states that Plaintiffs cannot show that the alleged failure to train caused Esparza's death. (*Id.*, at 4).

II.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A fact is "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also U.S. v. Arron*, 954 F.2d 249, 251 (5th Cir. 1992). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 248. If the evidence rebutting the motion for summary judgment is only colorable or is not significantly probative, summary judgment should be granted. *See Id.* at 2511; *see also Thomas v. Barton Lodge, Ltd.*, 174 F.3d 636, 644 (5th Cir. 1999). The summary judgment procedure, therefore, enables a party "who believes there is no genuine issue as to a specific fact essential to the other side's case to demand at least one sworn averment of that [specific] fact before the lengthy process continues." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886-88 (1990).

Under Rule 56(c), the moving party bears the initial burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial and of identifying those portions of the record that demonstrate such absence. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 576, 586-87 (1986); *see also Burge*, 187 F.3d at 464.

Where the moving party has met its Rule 56(c) burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . [T]he nonmoving party must come

forward 'with specific facts showing that there is a *genuine issue for trial.*'" *Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87 (quoting FED. R. CIV. P. 56(e)) (emphasis in original). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Engstrom v. First Nat'l Bank*, 47 F.3d 1459, 1462 (5th Cir. 1995). To sustain the burden, the nonmoving party must produce evidence admissible at trial. *See Anderson*, 477 U.S. at 242; *see also Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992) (stating that "[t]o avoid a summary judgment, the nonmoving party must adduce admissible evidence which creates a fact issue.").

The Court reviews the facts in the light most favorable to the nonmovant and draws all reasonable inferences in favor of the nonmovant. *See Brown v. Bunge Corp.*, 207 F.3d 776, 781 (5th Cir. 2000). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252.

III.

Section 1983 provides a private right of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" to redress the deprivation of rights secured by the United States Constitution or federal law. 42 U.S.C. § 1983; *Monell v. Dep't of Soc. Services of N.Y.*, 436 U.S. 658, 660 (1978). In *Monell v. Department of Social Servs.*, the Supreme Court held a municipality or governmental entity can be found liable under Section 1983 only if the entity itself causes the constitutional violation at issue. 436 U.S. 658. Respondeat superior or vicarious liability is not a basis

for recovery under Section 1983. *See Collins v. City of Harker Heights,* 503 U.S. 115 (1992); *Monell,* 436 U.S. at 691-94, 98 S.Ct. 2018. A municipality may not be held liable under Section 1983 solely because it employs a tortfeasor. *Gonzalez v. Westbrook,* 118 F.Supp.2d 728, 733 (W.D. Tex. 2000). Only when the execution of the government's policy or custom inflicts the injury can the governmental entity beheld liable under section 1983. *Id.* (citing *Board of County Comm'rs v. Brown,* 520 U.S. 397, 403-04 (1997); *Doe v. Dallas Indep. Sch. Dist.,* 153 F.3d 211, 215-16 (5th Cir. 1998)).

A municipality may be liable for failing to provide adequate training to its employees, as Plaintiffs claim here. *See Brown v. Bryan County,* 219 F.3d 450, 457 (5th Cir. 2000); *Pickens v. Harris County,* No. H-05-2978, 2007 WL 3175079, at *10. "The failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury." *Bryan County,* 219 F.3d at 457 (citing *City of Canton,* 489 U.S. 378, 390 (1988). To establish a failure to supervise claim against the City, Plaintiffs must show: (1) there was a policy or custom of providing inadequate training, (2) which reflected a deliberate indifference by the City, and (3) that the inadequate training was a "moving force" behind the violation of Plaintiffs' rights. *See id.*

A.

Plaintiffs argue a jury could find that prior to Esparza's death in January 2007, the City failed to provide adequate CIT training to its officers. (Instrument No. 83, at 12). Plaintiffs state that in

2004, the Texas Certified Law Enforcement Officers Association ("TCLEOSE") required all new peace officers and all supervisors to receive some CIT training. (*Id.*). However, Plaintiffs allege that TCLEOSE's training requirements were insufficient and were "not effectively covering HPD's need for dealing with mental health consumers." (*Id.*). Plaintiffs state that in response to this need, Officer Frank Webb ("Webb") wrote and submitted a proposal in December 2004 ("2004 proposal") to Executive Assistant Chief of Police for Patrol Operations T.N. Oettmeier ("Oettmeier"). (*Id.*). The 2004 proposal suggested requiring all officers to complete twenty-four hours of CIT training and certifying all patrol sergeants in CIT training. (Instrument No. 70-10). Plaintiffs claim that Oettmeier and Chief of Police Hurtt considered the 2004 proposal, but did not act upon it. (Instrument No. 83, at 14).

Finally, Plaintiffs reference the Meadours Act, Tex. Occ. Code § 1701.253, which became effective on September 1, 2005. (*Id.*). By passing the Meadours Act, "the Texas Legislature picked up the baton and . . . imposed larger CIT training requirements for all peace officers in the State of Texas." (*Id.*). Although the Meadours Act imposed CIT training requirements for all peace officers in 2005, these requirements were less extensive than those recommended by Webb's 2004 proposal. Plaintiffs further mention that the Meadours Act did not require compliance for four years, until September 1, 2009, well after Esparza's death. In sum, Plaintiffs suggest that the City's failure to implement the 2004 proposal and to expedite compliance with the Meadours Act constituted a policy of inadequate training.

Defendant denies that the City's CIT training program was insufficient or that it failed to provide adequate CIT training to its officers. (Instrument No. 80, at 7-8). Defendant asserts "there is no evidence that HPD's training or decision not to certify all of its police officers and sergeants amounted to inadequate training." (*Id.*, at 8). First, Defendant submits evidence of other cities' police departments that do not certify all of their patrol sergeants and officers. (*Id.*). Second, Defendant claims that some police departments and studies conclude that CIT certification for one hundred perfect of the officers is not preferred. (*Id.*, at 8). Finally, Defendant states that HPD's CIT training program was "excellent," "followed the national CIT model," "was very competent and well-regarded," and "met or exceeded TCLEOSE and state requirements." (*Id.*, at 8-9).

Municipal liability for a failure to train requires (1) an official policy or custom of failing to adequately train, of which (2) a policy maker can be charged with actual or constructive knowledge. *Pineda v. City of Houston,* 291 F.3d 325, 328 (5th Cir. 2002). The existence of a "policy of custom" can be established with proof of: "(1) a policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official delegated policy making authority; or (2) a persistent, widespread practice of city officials or employees which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Webster v. City of Houston,* 735 F.2d 838, 841 (5th Cir. 1984); see *Board of County Comm'rs v. Brown,* 520 U.S. at 404.

1.

First, Plaintiffs suggest that HPD's official decision to not implement the CIT training recommendations in the 2004 proposal constituted an official policy of failing to adequately train officers. The 2004 proposal was prepared under Oettmeier's direction by Officer Webb, who was part of the CIT Administrative Unit. (Instrument No. 70-10, at 1). At the time that it was prepared, the TCLEOSE mandated sixteen hours of basic CIT training for all new peace officers and eighteen hours of CIT training for all supervisors. However, the 2004 proposal noted that only thirty percent of all CIT calls were being dispatched to CIT officers; seventy percent of CIT calls were being cleared by non-CIT trained officers. (Instrument No. 70-14, at 4). The 2004 proposal stated that this disparity created "a potential liability for the department. If we dispatch a non-CIT officer to a CIT call and the officer shoots and kills the mental health consumer, the community will ask why we didn't use a CIT officer. We could be liable if a CIT officer was available but not used." (*Id.*, at 6). The 2004 proposal specifically noted that HPD could "be liable for not providing adequate training to the non-CIT officers who we know are responding to a high percentage of our calls." (*Id.*).

The 2004 proposal recommended resolving the above concerns with five suggestions, or Issues. (Instrument No. 70-14). Issues One and Two are addressed by Plaintiffs and are relevant to the instant case. Issue One of the 2004 proposal suggested certifying all officers in CIT by requiring all officers to complete twenty-four hours of CIT training. (Instrument No. 70-10, at 2). The purpose Issue One

was to increase the number of CIT officers who would be available to handle scenes with mental health components. (*Id.*).

The HPD declined to implement Issue One. Oettmeier discussed the 2004 proposal with HPD Chief of Police Hurtt. Oettmeier testified that he and Chief Hurtt "gave careful thought to it and . . . tried to determine how [to] balance the needs of these issues against other pressing needs that needed to be addressed through training as well." (Instrument No. 83-6, at 10, 13). Oettmeier stated in an affidavit that Issue One of the 2004 proposal "ignore[d] the reality that training is a limited, valued resource." (Instrument No. 70-10, at 2). Lieutenant Michael Lee ("Lee"), who works in the Mental Health Unit, stated that "it was a lot of officers to take off the street every time we trained CIT officers; and I know that was one of the reasons that played a part in the decision" to not implement Issue One of the 2004 proposal. Instead of implementing Issue One and giving all officers twenty-four hours of CIT training, the HPD took alternative steps to increase the availability of already-trained CIT trained officers. Oettmeier stated that "an effort was made to identify all officers who had sufficient training to be designated as a CIT officer . . . This resulted in an immediate infusion of a large number of officers listed as CIT trained. Consequently, when a Dispatcher would be assigning patrol cars to respond to a scene involving a mental health crisis, the likelihood of a patrol car with a CIT-trained officer being available was also increased." (Instrument No. 70-10, at 3).

Issue Two of the 2004 proposal suggested certifying all patrol sergeants in CIT training. (*Id.*, at 3).

According to Oettmeier, this was a "pro-active suggestion" to preclude any possible conflicts that could arise between a lower-ranked CIT officer and a higher-ranked sergeant at the scene of an incident involving a mental health crisis. (*Id.*, at 3). The HPD also declined to implement Issue Two. Oettmeier stated in an affidavit that "the real world experience actually showed that in almost all cases involving a mental health crisis, a supervisor would defer to the judgment of a CIT officer on the scene. Therefore, since HPD already had some CIT certified sergeants, and since there was no identifiable pattern of problems arising from either the lack of needed CIT certified sergeants or any type of conflict as discussed above, I declined to recommend this requested training proposal." (*Id.*).

The evidence demonstrates that Chief of Police Hurtt and Executive Assistant Chief of Police Oettmeier collectively decided, in their official capacities, not to implement the 2004 proposal and require all officers and sergeants to receive twenty-four hours of CIT training, despite evidence that seventy percent of CIT calls were being answered by non-CIT officers. In rejecting the 2004 proposal, Hurtt and Oettmeier made an official decision to require fewer hours of CIT training for HPD officers and sergeants. Additionally, Hurtt and Oettmeier decided not to require all sergeants to be CIT certified, as the 2004 proposal recommended. Viewing the evidence in the light most favorable to Plaintiffs with respect to the 2004 proposal, the Court finds Plaintiffs have raised a fact issue regarding whether the City had an official policy or custom of inadequate CIT training for HPD officers.

Plaintiffs have also offered sufficient evidence to raise a fact issue as to whether a policymaker can be charged with actual or constructive knowledge of the alleged inadequate CIT training. As Chief of Police, Hurtt was a policymaker for the HPD. Hurtt had actual knowledge of the 2004 proposal and was involved in the decision not to implement the 2004 proposal. Accordingly, the Court finds that a fact issue has been raised about whether Hurtt's and Oettmeier's decision not to implement the 2004 proposal constituted an official policy or custom of inadequate CIT training, of which a policymaker had actual knowledge.

2.

Shortly after the 2004 proposal was submitted and rejected by the HPD, the Texas Legislature passed the Meadours Act, which became effective on September 1, 2005 and imposed larger CIT training requirements for all peace officers in the State of Texas. Tex. Occ. Code § 1701.253(j). (Instrument No. 83, at 12; Instrument No. 83-2, at 12). The Meadours Act required *every* officer (not only *new* officers) to receive sixteen hours of CIT training, and required all sergeants to complete eighteen hours of CIT training. (Instrument No. 83-2, at 8). Police departments were given four years, until September 1, 2009, to comply with the CIT training requirements. (Id).

Plaintiffs suggest that the passage of the Meadours Act in 2005 "put the City on notice" of issues surrounding the City's CIT training program. (Instrument No. 83, at 12). Plaintiffs imply that the City's failure to expedite compliance with the Meadours Act constituted a failure to train. (*Id.*). The

Court finds this argument unpersuasive. Although Esparza's death occurred in January 2007, before all the HPD officers and sergeants were trained in CIT as required by the Meadours Act, the City was complying with the requirements of the Meadours Act in the time period proscribed. (Instrument No. 83-2, at 8). There is no evidence demonstrating that the City was unnecessarily delaying the implementation of the Meadours Act or that they would not be in full compliance with the Meadours Act by the statutory deadline. Accordingly, the Court finds that Plaintiffs have failed to raise a fact issue as to whether the City's timeline with respect to its implementation of the Meadours Act constituted a policy or custom of inadequate CIT training for HPD officers.

B.

Plaintiffs allege the City maintained its policy of failing to adequately train officers with deliberate indifference to the known or obvious risk that it endangered the constitutional rights of Plaintiffs and mentally ill consumers, like Esparza. (Instrument No. 196, at 15).

To show that a municipality was deliberately indifferent such that it is liable for failure to train its employees, a plaintiff usually must show "a pattern of violations" and that "the inadequacy of the training is 'obvious and obviously likely to result in a constitutional violation.'", *Pickens,* 2007 WL 3175079, at *10 (quoting *Estate of Davis v. City of N. Richland Hills,* 406 F.3d 375, 381 (5th Cir. 2005)). However, even if a plaintiff does not establish a pattern of violations, the Fifth Circuit has found that a plaintiff can establish deliberate indifference through the use

of a single incident. This "single incident exception" has been characterized by the Fifth Circuit as "a narrow one, one [it has] been reluctant to expand." *Pickens,* 2007 WL 3175079, at *11 (citing *Burge v. St. Tammany Parish,* 336 F.3d 363, 370 (5th Cir. 2003)); *Bryan County,* 219 F.3d at 460-61; *see Estate of Davis,* 406 F.3d at 381. To prove liability under the single-incident exception, a plaintiff must show that the defendant acted with deliberate indifference by disregarding a known or obvious consequence of his action. *Waltman v. Payne,* 535 F.3d 342, 350 (5th Cir. 2008) (citing *In re Foust,* 310 F.3d 849, 862 (5th Cir. 2002)); *see also Bryan County,* 219 F.3d at 457. Specifically, a plaintiff must prove that the "highly predictable" consequence of a failure to train would result in the specific injury suffered. *Roberts v. City of Shreveport,* 397 F.3d 287, 295 (5th Cir. 2005).

1.

To establish that Defendant was deliberately indifferent to its failure to train officers, Plaintiffs must show a "pattern of violations" and that the inadequacy of the training was "obvious and obviously likely to result in a constitutional violation." *Pickens,* 2007 WL 3175079, at *10. "For an official to act with deliberate indifference, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Estate of Davis,* 406 F.3d at 381.

Defendant contends that there is no evidence of deliberate indifference in the HPD's decision to not implement the 2004 proposal because other police departments had not certified all their patrol

sergeants and officers in CIT. (Instrument No. 70, at 10). Defendant also avers that "there was no 'need' by HPD to certify all patrol sergeants [in CIT] because there had been 'no identifiable pattern of problems arising from either the lack of needed CIT certified sergeants or any type of conflict'" between a CIT certified officer and a sergeant. (*Id.*).

Plaintiffs submit that Defendant was deliberately indifferent because the shooting of Esparza, a mentally ill person, by HPD officers was not a single incident. Plaintiffs argue that "the City was ignoring the potentially fatal outcome where non-CIT trained officers were shooting and killing mental health consumers . . . This potential risk arose more than 40 times each day." (Instrument No. 83, at 14). Plaintiffs allege that the 2004 proposal demonstrates a pattern of violations and that the alleged inadequacy of the training was "obvious and obviously likely to result in a constitutional violation." (*Id.*, at 15). Finally, Plaintiffs point to Lee's testimony that a couple months after Esparza's death, HPD officers shot another mentally ill consumer, Steven Guillory.

Here, the Court finds that there is no evidence of a "pattern of violations" prior to or at the time of Esparza's death. The 2004 proposal noted with concern that seventy percent of all CIT calls were being dispatched to non-CIT officers, which could present liability concerns for the City. (Instrument No. 70-14, at 4-6). However, a CIT call being answered by non-CIT officers does not represent a constitutional violation. Plaintiffs also establish that at the time of Esparza's death in January 2007, approximately forty percent of all SWAT calls involved a mentally ill or

emotionally ill person. (Instrument No. 83-2, at 4). This statistic is not evidence of a pattern of violations.

Plaintiffs' expert witness Michael D. Lyman ("Lyman") references two Houston Chronicle articles published in 2004 "identifying problems within the Houston Police Department regarding the mishandling of CIT calls and the need for proper training." (Instrument No. 83-7, at 10). Lyman states that one of the articles stated that "[a]t least 10 mentally ill people shot were unarmed or carrying objects such as screwdrivers or pieces of wood." Standing alone, Lyman's testimony is insufficient to establish a pattern of constitutional violations related to the City's alleged failure to train.

Additionally, Plaintiffs have failed to present evidence that the City's alleged failure to train was "obvious and obviously likely to result in a constitutional violation." *Pickens*, 2007 WL 3175079, at *10. Webb, who authored the 2004 proposal, testified that the proposal was intended to increase the percentage of CIT calls that are answered by CIT trained officers and alleviate potential "litigation problems." (Instrument No. 83-5, at 6, 8). However, he does not state that the 2004 proposal was intended to or likely to prevent potential constitutional violations. Webb also does not state that the City's failure to expand the CIT training program was likely to result in constitutional violations. The 2004 proposal itself does not list as one of its goals preventing constitutional violations and/or fatalities of mental health consumers. (Instrument No. 64).

Oettmeier, who was involved in the decision to not implement the 2004 proposal, does not believe that

Esparza's death was the type of incident that was addressed by or would have been prevented by the 2004 proposal. (Instrument No. 83-6, at 15). He went on to state that he does not base his opinions regarding training "on what's written in the [Houston] Chronicle by some reporter." (*Id.*). He was vaguely aware of two other mental health consumers who were shot within four and a half months after Esparza's death (*Id.*). However, Oettmeier testified that internal affairs investigations following shootings can last many years, and therefore he did not have very much access to information regarding shootings of mental health consumers. (*Id.*, at 15-16). In sum, there is no evidence that an HPD official was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," nor did any HPD official draw such an inference. *Estate of Davis,* 406 F.3d at 381.

Accordingly, the Court finds that Plaintiffs have failed to bring forth evidence of a pattern of violations and that the City's alleged failure to train was "obvious and obviously likely to result in a constitutional violation." *Pickens,* 2007 WL 3175079, at *10.

2.

Although Plaintiffs did not establish a pattern of violations, Plaintiffs can still prove deliberate indifference by way of the "single incident exception." *See Estate of Davis,* 406 F.3d at 381. To prove liability under the single-incident exception, a plaintiff must at least show that the defendant acted with deliberate indifference by disregarding a known or obvious consequence of his action. *Waltman,* 535 F.3d at 350

(citing *In re Foust,* 310 F.3d at 862); *see also Bryan County,* 219 F.3d at 457. In determining whether a defendant disregarded a "known or obvious" consequence, courts looks to see if the plaintiff's specific alleged injury was a "highly predictable" consequence of the failure to train. *Roberts,* 397 F.3d at 295; *see also Plemons v. Amos,* 306 Fed. Appx. 160, 164 (5th Cir. 2009).

Here, Plaintiffs submit no evidence to establish, nor do they even allege, that Esparza's death was a "highly predictable" consequence of the City's alleged failure to adequately provide CIT training to its officers. Accordingly, Plaintiffs have failed to establish that Defendant was deliberately indifferent with respect to the City's alleged failure to train.

C.

Assuming, *arguendo,* that Plaintiffs raised a fact issue as to the second prong of the failure to train test, the Court considers whether Plaintiffs have established causation. The Fifth Circuit has described the causation requirement as "a direct causal link" between the City's action and the violation of a plaintiff s rights. *See Waltman,* 535 F.3d at 350. For causation in cases involving claims of inadequate training or supervision, the Fifth Circuit has called for a showing that "the failure to train [or supervise] represented the 'moving force' behind the constitutional violation." *Roberts,* 397 F.3d at 295 (quoting *Bryan County,* 219 F.3d at 461). Plaintiffs need not prove that the City's alleged failure to train was the "sole cause" of Plaintiffs' and Esparza's alleged constitutional violations. *Id.*

Defendant argues that Plaintiff cannot establish a direct causal link between the City's action and the alleged violations of Plaintiffs' and Esparza's Constitutional rights. (Instrument No. 70, at 11-12). Defendant claims because a "CIT certified officer [Officer Broussard] made the Esparza scene . . . [t]here is no evidence that Plaintiffs' theory of Defendant's failure to certify all patrol officers was the moving force" behind the alleged constitutional violations. (*Id.*, at 11). Defendant further points out that there was no evidence of any conflict between Sergeant Bryant and Officer Broussard at the scene of the incident. (*Id.*, at 12).

Plaintiff asserts that the City's failure to implement the 2004 proposal caused Plaintiffs' and Esparza's constitutional injuries. (Instrument No. 83, at 17). The 2004 proposal included two components that are relevant to the Plaintiffs' claims – Issue One and Issue Two. (Instrument No. 64). Issue One suggested certifying all officers in CIT by requiring them to complete twenty-four hours of CIT training. (Instrument No. 64, at 6-10; Instrument No. 70-10, at 2). The purpose of Issue One was to address the concern that seventy percent of CIT calls were being answered by non-CIT trained officers. (*Id.*). Issue Two of the 2004 proposal suggested certifying all patrol sergeants in CIT training. (Instrument No. 64, at 12; Instrument No. 70-10, at 3). Issue Two was intended to preclude any possible conflicts that could arise between a lower-ranked CIT officer and a higher-ranked sergeant at the scene of an incident involving a mental health crisis. (Instrument No. 70-10, at 3). Both Issue One and Issue Two were considered and rejected by Defendant. Accordingly, the Court considers whether Plaintiffs' and Esparza's alleged

constitutional injuries were caused by (1) the failure to require CIT training for all peace officers by January 2007, and (2) the failure to require CIT training for all sergeants by January 2007.

First, if Issue One of the 2004 proposal had been accepted, every HPD peace officer would have been CIT certified. (Instrument No. 64, at 8-12). The four officers who entered the Valles' home – Sergeant Bryant, Officer Chaisson, Officer Walsh and Officer Duarte – would have completed twenty-four hours of CIT training and would have been CIT certified. (*Id.*). The evidence shows that after the founding of the CIT program in 1999 and prior to the incident on January 2007, Sergeant Bryant had received one and a half hours of CIT training. (Instrument No. 83-5, at 21). He had also received twenty three and a half hours of training in 1996, 1998, 2000 and 2005 in "CIT-related" subject matter. (*Id.*). Sergeant Bryant completed the Meadours Act's sixteen-hour CIT training requirement in November 2007, ten months after the incident at the Plaintiffs' home. (*Id.*; Instrument No. 82-2, at 9). Officer Broussard, the trained CIT specialist present at the scene of the incident, was CIT-certified and had completed forty hours of CIT training at the time of the incident. (Instrument No. 83-5, at 21). No evidence in the record indicates the amount of CIT training that Officers Chaisson, Walsh or Duarte had received at the time of the incident in January 2007.

Here, the Court finds no evidence that the alleged constitutional violations – unlawful entry into the Valles' home and excessive force against Esparza – would have been prevented if Sergeant Bryant, Officer Chaisson, Officer Walsh and Officer Duarte had received twenty-four hours of CIT training. Issue One

specifically aimed to increase the responsiveness of CIT-trained officers to CIT calls. (Instrument No. 64, at 6-10; Instrument No. 70-10, at 2). However, in the situation at hand, Officer Broussard was a CIT-trained officer and was present at the scene of the incident. Therefore, Issue One's main intent, which was to increase the number of CIT calls that are answered by CIT officers, was already accomplished here.

Additionally, Lee testified that just because officers are trained in CIT, the circumstances of any given incident will not necessarily end up differently. (Instrument No. 83-3, at 10). Oettmeier stated that he did not believe that Esparza's death was an incident that was addressed by or would have been prevented by the 2004 proposal. (Instrument No. 83-6, at 15). The evidence shows that Officer Broussard, the CIT-trained officer, had been unable to make significant progress in her efforts to communicate with Esparza and to control the situation. (Instrument No. 83-4, at 3). There is no evidence that if the officers had received CIT training, they would have acted differently in the situation or decided not to enter the Valles' home. Further, there is no evidence that Esparza's death would not have resulted if the officers had received CIT training.

Second, if Issue Two of the 2004 proposal had been implemented, Sergeant Bryant would have been CIT certified and would have received twenty-four hours of CIT training. Issue Two was intended to preclude any possible conflicts that could arise between a CIT officer and a higher-ranked sergeant at the scene of an incident. (Instrument No. 70-10, at 3). Plaintiffs assert that at the scene of the incident, Sergeant Bryant "overcalled CIT Officer Broussard, abandoned her CIT

efforts, formed an assault team, entered the side door, all in an effort to surprise and seize Omar Esparza." (Instrument No. 83, at 17). Plaintiffs aver that if Sergeant Bryant had received sufficient CIT training under the 2004 proposal, he would have given Officer Broussard more time to use CIT de-escalation tactics, which may have prevented the officers' entry into the Valles' home and Esparza's subsequent death. (*Id.*).

The Sergeant in any given incident has authority over the other officers, including CIT trained officers, to "overcall the CIT tactics." (Instrument No. 83-5, at 22). Lee testified that there is "always that possibility that a supervisor [or Sergeant] not understanding the CIT approach may not understand why it's taking the officer so long to . . . talk to this [mentally ill] person." (Instrument No. 83-3, at 22). However, Oettmeier stated in an affidavit that "the real world experience actually showed that in almost all cases involving a mental health crisis, a supervisor would defer to the judgment of a CIT officer on the scene." (Instrument No. 70-10, at 2-3).

Here, contrary to Plaintiffs' assertions, there is no evidence that Sergeant Bryant entered the Valles' home without Officer Broussard's approval or "overcalled" Officer Broussard's CIT tactics. (Instrument No. 83-5, at 8). Webb testified that he has not "seen anything to indicate that there was a problem" or conflict regarding how to handle the incident between Sergeant Bryant and Officer Broussard. (Instrument No. 83-6, at 22). Although Sergeant Bryant did not tell Officer Broussard that he and other officers were going to make entry into the Valles' home, Officer Broussard does not state that she disapproved of this action or felt that it was improper

in the situation. Officer Broussard does not state that Sergeant Bryant overcalled her CIT tactics.

Plaintiffs' expert, Lyman, suggests that if Sergeant Bryant would have received "proper [CIT] training," he would have "directed Broussard to spend as much time as necessary with Esparza to control the situation" and to "take the necessary time to properly de-escalate Omar Esparza's personal crisis." (Instrument No. 83-7, at 7). However, there is no evidence that Officer Broussard needed additional time to de-escalate and control the situation. Esparza had slammed the door in Officer Broussard's face on three separate occasions. (Instrument No. 83-3, at 16). Officer Broussard testified that Esparza was "refusing all commands to . . . continue the line of communication." (*Id.*; Instrument No. 83-4, at 3). Officer Broussard then communicated this fact to Sergeant Bryant, who subsequently made entry into the Valles' home. (Instrument No. 83-4, at 3). Although the CIT training program generally instructs officers that situations involving mentally ill consumers can take longer than average, Officer Broussard does not maintain that she needed more time to communicate with Esparza prior to the officers' entry into the Valles' house.

Finally, even if Sergeant Bryant had given Officer Broussard more time to negotiate with Esparza using de-escalation tactics, there is no evidence that the officers' entry into the Valles' house was not inevitable. Lee testified that in situations involving CIT officers, if the CIT officer is not successful in using de-escalation tactics, "at some point a decision has to be made to move to the next step . . . ." (Instrument No. 83-3, at 16). No evidence in the record indicates that Officer Broussard's CIT tactics could have prevented

the ultimate entry into the Valles' home. Officer Broussard does not state that she believes she could have successfully de-escalated and controlled the situation on her own.

Accordingly, Plaintiffs fail to establish that Defendant's alleged failure to train was the moving force behind the alleged constitutional violations. Defendant City of Houston's Motion for Summary Judgment on Plaintiffs' Failure to Train Claim is **GRANTED.** (Instrument No.70).

IV.

For the foregoing reasons, the Court **GRANTS** Defendant City of Houston's Motion for Summary Judgment **(Instrument No. 70)**.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this 24th of August, 2009, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-07-2439

[Filed August 24, 2009]

JOSE VALLE, INDIVIDUALLY and as REPRESENTATIVE OF THE ESTATE OF OMAR ESPARZA, and ASUNCION VALLE, Plaintiffs,	)
versus	)
CITY OF HOUSTON, Defendant.	)

FINAL JUDGMENT

For the reasons stated in the Court's Order granting Defendant City of Houston's first Motion for Summary Judgment (**Instrument No. 29**), signed on the 27th day of March, 2009 and the Court's Order granting Defendant City of Houston's second Motion for Summary Judgment (**Instrument No. 70**), signed on the 24th day of August, 2009, this action is **DISMISSED**.

THIS IS A FINAL JUDGMENT.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this 24th day of August, 2009, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-07-2439

[Filed March 27, 2009]

JOSE VALLE, INDIVIDUAL and as REPRESENTATIVE OF THE ESTATE OF OMAR ESPARZA, and ASUNCION VALLE, Plaintiffs,	)
versus	)
CITY OF HOUSTON, Defendant.	)

ORDER

Pending before the Court is Defendant City of Houston's Motion for Summary Judgment. (Instrument No. 29).

I.

A.

Plaintiffs Jose Valle and Asuncion Valle ("Plaintiffs"), individually and as representatives of the estate of Omar Esparza ("Esparza"), deceased, bring the instant claim against Defendant, the City of Houston ("Defendant" or "City"). (Instrument No. 56). The case arose after the fatal shooting of Esparza, Plaintiffs' son, by City of Houston police officers. (*Id.*, at 6-7). Plaintiffs seek relief pursuant to 12 U.S.C. § 1983 ("Section 1983") for alleged violations of the Fourth and Fourteenth Amendments. Plaintiff also seek relief for negligent conduct of the City of Houston police officers pursuant to Chapter 101 *et seq* of the Texas Civil Practice and Remedies Code. (*Id.*, at 8-9).

B.

On Sunday, January 7, 2007, Esparza, Plaintiffs' 21-year old son, was fatally shot by City of Houston police officers in his home at 5018 Curtain Street, Houston, Texas. (*Id.*, at 2). The circumstances leading up to Castillo's death are as follows:

Plaintiffs allege that during the last several months of 2006, Esparza had been acting in an unusual manner and expressed signs of depression, anxiety and confusion. (*Id.*). His parents had sought psychiatric treatment for him through the Harris County Hospital District in Houston, Texas, but Esparza had not been accepted for treatment as of the date of the incident at issue. (*Id.*).

On Sunday, January 7, 2007, Esparza and his family went to a nearby McDonald restaurant to pick up food for lunch. (*Id.*). On their way home, Esparza become upset regarding the food and told his family members that the food was all his. (*Id.*). Once they arrived at their home, Esparza went inside and locked his family out. (*Id.*). After standing outside their home for over one hour, Plaintiffs called 911 for assistance and requested a Spanish-speaking operator because neither of them spoke English. (*Id.*, at 2-3; Instrument No. 36, at 6). Plaintiff allege that in calling 911, it was their hope that emergency medical technicians would come to their house and take Esparza to Ben Taub Hospital for treatment. (Instrument No. 56, at 3).

The Harris County 911 dispatcher sent Houston Police Department ("HPD") officers to Plaintiffs' home in response to their call. (*Id.*). The first officer to arrive at the scene was Officer J. Duarte. (*Id.*). Plaintiffs allege that they showed Officer Duarte admission papers from Ben Taub Hospital, and through gestures and their daughter's assistance, asked his help in caring for Esparza. (*Id.*). Officer Duarte went to the front door of the home and began a dialogue with Esparza through the door. (*Id.*). Esparza spoke English and was able to communicate with the Officer Duarte. (*Id.*). Sometime thereafter, HPD Officer S. Walsh arrived at the home and also participated in the conversation with Esparza at the front door of the house. (*Id.*). Then, HPD Officers J.D. Seay and Rodney Chaisson, Jr. arrived. (*Id.*). The officers conversed with Esparza for over thirty minutes, but Esparza stated that he was not going to come out of the house and he was not going to allow the officers inside. (Instrument No. 36, at 7).

Finally, HPD Sergeant A.R. Bryant arrived at Plaintiffs' home and assumed control of the scene outside the house. (Instrument No. 56, at 3). He established communication with HPD Headquarters to report the situation and to seek orders. (*Id.*). He was put in touch with Captain David Williams of the Special Weapons and Tactical/Hostage Negotiation Team ("SWAT"/"HNT"). (*Id.*). Captain Williams directed Sergeant Bryant to get a Crisis Intervention ("CIT") trained specialist officer to the scene to conduct negotiations with Esparza, and Sergeant Bryant got Officer Callandra Broussard, a trained CIT specialist, to come to the scene. (*Id.*, at 3-4).

Upon her arrival at the scene, Officer Broussard extracted a shotgun from the trunk of her car and proffered it to Sergeant Bryant. (*Id.*). She then commenced negotiations with Esparza but was unable to make significant progress. (*Id.*).

Sergeant Bryant spoke with Captain Williams on the telephone again, and Captain Williams authorized Sergeant Bryant to form an entry team and make entry into the home. (*Id.*; Instrument No. 36, at 8). Sergeant Bryant called the other officers together near his vehicle to discuss these further orders he had received from Captain Williams. (Instrument No. 56, at 3). Sergeant Bryant and three other officers prepared to enter the home and began arming themselves with a taser weapon, a soft-impact weapon, and their sidearms. (*Id.*). Upon seeing the officers prepare for the entry, Plaintiff Jose Valle approached them and asked that they not shoot his son. (*Id.*). Officer Duarte, through gestures and limited conversation, allegedly assured Jose Valle that "everything would be okay." (*Id.*).

At approximately 5:21 p.m., while Officer Broussard was still conversing with Esparza through the front door of the home, Sergeant Bryant led a assault team of three other officers into the side door on the northeast corner of Plaintiffs' home, with the approval of Captain Williams. (*Id.*; Instrument No. 36, at 9). During the entry, Officer Chaisson was wearing an assault helmet. (Instrument No. 56, at 3). Officer Duarte was armed with a pistol, Officer Walsh was armed with a pistol and a taser gun, and Officer Chaisson was armed with a 40 caliber automatic pistol. (*Id.*). Sergeant Bryant was armed with his pistol and Officer Broussard's shotgun loaded with non-lethal soft-impact beanbags. (*Id.*).

According to Defendant, Esparza was in possession of a hammer in his right hand and charged at the officers with the hammer raised. (Instrument No. 29, at 6). The officers began discharging their weapons less than thirty seconds after entering the home. (Instrument No. 56, at 4). Sergeant Brant fired three blasts from the shotgun, which contained non-lethal soft-impact beanbags, but was unable to stop Esparza's movement. (*Id.*, at 5; Instrument No. 29, at 6). Officer Walsh [fired his taser gun and missed Esparza. (*Id.*). Then Officer Chaisson [fired his 40 caliber automatic pistol six times at Esparza - three bullets missed Esparza but three bullets hit him (*Id.*).

After the gunfire subsided, Plaintiff Asuncion Valle asserts that she ran through the front door of the her home, into the living room to the doorway into the den, and saw her son lying on his back on the floor. (Instrument No. 56, at 5). Plaintiffs claim that she ran to Esparza, but was pulled away by Officer Duarte and

Officer Broussard, who had followed her into the home. (*Id.*). According to Plaintiffs, Esparza was still breathing when Asuncion Valle was pulled away. (*Id.*). Asuncion Valle claims that she did not see a hammer in the room where Esparza had been shot. (Instrument No. 36, at 10). Officer Broussard allegedly took control of the hammer and threw it outside on the front lawn of the Valles' home. (*Id.*, at 11; Instrument No. 36-15).

Following the incident, Captain Williams of SWAT/HNT was disciplined by HPD for violations of its policies relating to entry. (Instrument No. 29, at 6). Captain Williams appealed the reprimand. (Instrument No. 36, at 11; Instrument No. 36-16, at 2). On appeal, Civil Service Grievance Examiner Ana Cummings reversed the reprimand and found that Captain Williams had acted within the policies and procedures of the HPD. (*Id.*).

C.

Plaintiffs filed suit against Defendant City of Houston on July 26, 2007. (Instrument No.1). Plaintiffs allege that the City is liable for violations of the Fourth and Fourteenth Amendments. Plaintiffs aver that HPD Officers made a warrantless forcible entry into their home and made a lethal attempt to seize Esparza, which constituted an unreasonable search and seizure. (*Id.*, at 5-6). Plaintiffs further contend that the HPD officers acted under the orders of the Tactical Operations Commander, a policymaker for the City of Houston, and that their actions constituted excessive force. (*Id.*, at 6-7). Finally, Plaintiffs allege that the HPD officers who entered their home negligently deployed a taser gun when they seized Esparza, in violation of Chapter 101 of the

Texas Civil Practices & Remedies Code ("TCPRC"). (*Id.*, at 9). Plaintiffs contend that the negligence of these officers in their official capacity was a proximate cause of Esparza's death. (*Id.*). Plaintiffs seek damages in the amount of $3 million each, $50,000 for the wrongful search and seizure of their property, and attorney's fees. (*Id.*, at 10-11).

Defendant City of Houston moved for summary judgment on July 30, 2008. (Instrument No. 29). Defendant argues that Plaintiffs' constitutional claims against it must be dismissed because Plaintiffs cannot establish that an official policy or custom, made by a policymaker for the City, was a moving force behind the alleged unlawful entry or the alleged excessive force. (*Id.*, at 9-21). Defendant further argues that Plaintiffs cannot establish that the HPD officers acted negligently, or that any negligent action caused Esparza's death (*Id.*, at 21-23). Finally, Defendant asserts that Plaintiffs lack standing to bring the instant suit because the evidence indicates that Esparza may have had a son and administration of his estate may be necessary. (*Id.*, at 24).

Plaintiffs responded in opposition to Defendant's motion for summary judgment on August 24, 2008. (Instrument No. 36). Plaintiffs assert that Captain Williams served as a policymaker for the City, as he was the Captain of the Tactical Operations team and was the person designated by the City to handle similar arrest situations. (*Id.*, at 15-17). Plaintiffs also contend that Williams's decision "to send an assault team into the Valles' home" was a moving force in causing the assault team to unconstitutionally enter their home and unconstitutionally seize Esparza by lethal force. (*Id.*, at 12-13, 18-21). Plaintiffs aver that

the officers who entered the Valles' home negligently used their weapons and are thus liable under Texas law. (*Id.*, at 21-23). Finally, Plaintiffs claim that they have standing to bring the instant suit because there is no evidence that Esparza had any heirs except for them. (*Id.*, at 24-25).

Defendant City of Houston replied on September 5, 2008. (Instrument No. 43). Defendants dispute that Captain Williams was a policymaker for the City, and maintain that "Capt. William's single decision to allow entry" fails to establish a municipal policy or custom (*Id.*, at 2-4). Defendant further claims that Plaintiffs have failed to demonstrate that the officers' use of weapons was negligent. (*Id.*, at 4-5). Defendant states that the officers are entitled to qualified immunity on Plaintiffs' claims because their actions were reasonable. Finally, Defendant reasserts that Plaintiffs lack standing to bring the instant suit because the evidence indicates that Esparza may have had a son. (*Id.*, at 5).

Plaintiffs amended their Complaint on October 22, 2008, after the filing of Defendant's instant Motion for Summary Judgment, to assert an additional claim for failure to train. (Instrument No. 56). An amended scheduling ordered entered on October 22, 2008 requires parties to submit dispositive motions on the additional claim by April 1, 2009. (Instrument No. 57). Accordingly, Plaintiffs' claim for failure to train is not before the Court at this time.

II.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is

entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A fact is "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also U.S. v. Arron*, 954 F.2d 249, 251 (5th Cir. 1992). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 248. If the evidence rebutting the motion for summary judgment is only colorable or is not significantly probative, summary judgment should be granted. *See Id.* at 2511; *see also Thomas v. Barton Lodge, Ltd.*, 174 F.3d 636, 644 (5th Cir. 1999). The summary judgment procedure, therefore, enables a party "who believes there is no genuine issue as to a specific fact essential to the other side's case to demand at least one sworn averment of that [specific] fact before the lengthy process continues." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886-88 (1990).

Under Rule 56(c), the moving party bears the initial burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial and of identifying those portions of the record that demonstrate such absence. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 576, 586-87 (1986); *see also Burge v. Parish of St. Tammany*, 187 F.3d 452, 464 (5th Cir. 1999).

Where the moving party has met its Rule 56(c) burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . [T]he nonmoving party must come forward 'with specific facts showing that there is a *genuine issue for trial*.'" *Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87 (quoting FED. R. CIV. P. 56(e))

(emphasis in original). *See also Celotex Corp. v. Catrett,* 477 U.S. 317,322 (1986); *Engstrom v. First Nat'l Bank,* 47 F.3d 1459, 1462 (5th Cir. 1995). To sustain the burden, the nonmoving party must produce evidence admissible at trial. *See Anderson,* 477 U.S. at 242; *see also Thomas v. Price,* 975 F.2d 231, 235 (5th Cir. 1992) (stating that "[t]o avoid a summary judgment, the nonmoving party must adduce admissible evidence which creates a fact issue.").

The Court reviews the facts in the light most favorable to the nonmovant and draws all reasonable inferences in favor of the nonmovant. *See Brown v. Bunge Corp.,* 207 F.3d 776, 781 (5th Cir. 2000). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson,* 477 U.S. at 252.

III.

A.

The Court first considers whether Plaintiffs have standing to bring the instant suit.

Defendant City of Houston alleges that Plaintiffs do not have standing to bring the instant suit because administration of Esparza's estate may be necessary. (Instrument No. 29, at 24). Defendant asserts that evidence indicates that Esparza may have had a son, which would require either administration of Esparza's estate or the joining of this son as a Plaintiff to the suit. (*Id.*).

Plaintiffs respond that there is no need for an administration of Esparza's estate because Esparza "died without a will, and there are no debts owing by his Estate." (Instrument No. 36, at 24). Plaintiff further contend that they know of no heirs other than Esparza's natural parents and there is no evidence that Esparza had a son. (*Id.*, at 25).

Texas law provides that when a person dies intestate, all of the decedent's estate vests immediately in his heirs at law, subject to payment of the debts of the estate. TEX. PROB. CODE § 37. Where a person dies intestate, leaving no spouse or children, then title to any estate descends and passes to the decedent's mother and father, in equal portions. TEX. PROB. CODE § 38(a)(2). The heirs to an estate may recover the estate property if they can establish that there is no estate administration pending and no administration is necessary. *Shepherd v. Ledford*, 962 S.W.2d 28, 31-32 (Tex. 1998)(citing TEX. CIV. PRAC. & REM. CODE § 71.021(b)). Administration is deemed necessary if "two or more debts exist against the estate." TEX. PROB. CODE § 178(b) ("No administration of any estate shall be granted unless there exists a necessity therefor, such necessity to be determined by the court hearing the application.").

Here, it is not disputed that Esparza died intestate, or without a will. (Instrument No. 29, at 24). Jose Valle alleges that he is the father of Esparza and the personal representative of Esparza's estate. (Instrument No. 1, at 2). Jose Valle maintains that Esparza owned no real property, that no debts of Esparza's estate are owed, and that he is not aware of any children fathered by Esparza. (*Id.*; Instrument No.

36-19). He has also paid for Esparza's funeral expenses. (Instrument No. 36-19).

When offering examples of Esparza's mental deficiencies, Asuncion Valle testified that Esparza had mentioned an unknown son (Instrument No. 36-2, at 13). She believed that Esparza's mention of a son was evidence of his mental problems. Asuncion Valle also submitted an affidavit stating that she is not "aware of any children fathered by [Esparza]. Although he mentioned . . . wanting to give his own son a good education, [she] believed that reference to a 'son' was part of his hallucinations that came with his mental condition. [She has] not found any children fathered by [Esparza]." (Instrument No. 36-21).

The Court finds that it is Jose Valle's and Asuncion Valle's sworn testimony that any reference to a son by Esparza was related to his mental problems, and is not conclusive evidence that Esparza in fact had a son. Additionally, Esparza's employment tax filing listing "single with one dependent" is not probative evidence to establish that Esparza had a son. Without any probative evidence demonstrating that Esparza has heirs at law other than his parents Jose and Asuncion Valle, the Court finds that there are not "two or more debts" against Esparza's estate and that administration is not necessary at this time. Accordingly, Plaintiffs have standing to bring the instant suit.

B.

Plaintiffs bring the instant suit alleging violations of their constitutional rights pursuant to 42 U.S.C. § 1983 ("Section 1983"). Section 1983 provides a

private right of action against those acting "under color of any statute, ordinance, regulation, custom, or usage, of any State" to redress the deprivation of rights secured by the United States Constitution or federal law. 42 U.S.C. § 1983; *Monell v. Dep't of Soc. Services of N.Y.*, 436 U.S. 658, 660 (1978); *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 215 (5th Cir. 1998); *Casanova v. City of Brookshire,* 119 F. Supp. 2d 639, 648 (S.D. Tex. 2000). Section 1983 is not itself a source of substantive rights; it merely provides a method for vindicating already-conferred federal rights. *See Albright v. Oliver,* 510 U.S. 266, 271 (1994). Claims made pursuant to Section 1983 must be supported by specific facts establishing a constitutional deprivation of rights, not mere conclusory allegations. *Schultea v. Wood,* 47 F.3d 1427, 1433 (5th Cir. 1995). Furthermore, the constitutional deprivation must be intentional or due to deliberate indifference, not mere negligence. *See Holland v. City of Houston,* 41 F. Supp. 2d 678, 688 (S.D. Tex. 1999). Deliberate indifference is a stringent standard of fault and requires proof that an actor disregarded a known or obvious consequence of his action. *Holland,* 41 F. Supp. 2d at 699 (S.D. Tex. 1999) *(citing Bd. of the County Comm'n of Bryan County v. Brown,* 520 U.S. 397, 410 (1996)).

In a Section 1983 claim, a municipality such as the City of Houston can only be found liable where the municipality *itself,* through its wrongful conduct, causes the plaintiff's constitutional deprivation. *See City of Canton v. Harris,* 489 U.S. 378, 385 (1989) (*citing Monell,* 436 U.S. at 658). Consequently, the doctrine of *respondeat superior* cannot form the basis for liability. *Id.*

Additionally, a Section 1983 action against a municipality requires that the plaintiff establish that he was deprived of a constitutional right pursuant to an official policy or custom *Monell v. Dep't of Soc. Services of New York,* 98 S. Ct. 2018, 2035-36 (1978); *Flores v. Cameron County,* 92 F.3d 258, 263 (5th Cir. 1996). The municipal policy or custom must cause the employee to violate another's constitutional rights. *Fraire v. City of Arlington,* 957 F.2d 1268, 1277 (5th Cir. 1992). Moreover, there must be a "direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *Id.* The plaintiff must demonstrate that the policy or custom was the proximate cause of his injury. *Holland,* 41 F. Supp. 2d at 698. In addition to properly attributing the alleged conduct to the municipality, the plaintiff must establish that the municipality, through its deliberate conduct, was the "moving force" behind the alleged injury. *Bd. of County Comm'n of Bryan County,* 520 U.S. at 400. That is, the plaintiff must establish "the [municipality's] requisite degree of culpability." *Id.*

Governmental liability attaches only where there is a deliberate choice to follow a course of action and this choice is made by officials responsible for establishing final policy or custom with respect to the subject matter in question. *Jackson v. Katy Indep. Sch. Dist.,* 951 F. Supp. 1293, 1303 (S.D. Tex. 1996) *(citing Pembaur v. City of Cincinnati,* 475 U.S. 469, 483 (1986). Policy and custom have been defined as:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the [municipality's lawmaking officers]; or

> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents [municipal] policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the [municipality] or to an official to whom that body had delegated policy-making authority.

Eugene v. Alief Indep. Sch. Dist., 65 F.3d 1299, 1304 (5th Cir. 1995) (internal quotations and citations omitted).

More than one instance of constitutional injury is normally required to demonstrate such a policy or custom. *Kellough v. Bertrand*, 22 F. Supp. 2d 602, 610 (S.D. Tex. 1998); *accord City of Oklahoma City v. Tuttle*, 471 U.S. 808, 813 (1985). Generally, isolated violations do not constitute custom and policy, as required for section 1983 municipal liability. *Campbell v. City of San Antonio*, 43 F.3d 973, 977 (5th Cir. 1995); *Bennett v. Slidell*, 728 F.2d 762, 768, n.3 (5th Cir. 1984) ("Isolated violations are not the persistent, often repeated, constant violations, that constitute custom and policy as required for municipal § 1983 liability."). To show a governmental policy or custom under § 1983, a plaintiff must at least demonstrate:

> a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or serious incompetence or misbehavior was general or widespread throughout the police force.

Fraire v. City of Arlington, 957 F.2d 1268, (5th Cir. 1992). However, "a single decision by a policy maker may, under certain circumstances, constitute a policy for which a [municipality] may be liable." *Brown v. Bryan County,* 219 F.3d 450, 462 (5th Cir. 2000).

Here, Plaintiffs contend that the decision of Captain Williams on January 7, 2007 "to send an assault team into the Valles' home to seize their son constituted a decision by a policymaker [that was] the moving force in causing" Plaintiffs and Esparza Constitutional injury. (Instrument No. 36, at 12-13).

1.

To determine the liability of the City of Houston, the Court first considers whether an official City of Houston "policy statement, ordinance, regulation, or decision" was the moving force behind Plaintiffs' claims of unconstitutional entry, seizure and excessive force. *Eugene v. Alief Indep. Sch. Dist.,* 65 F.3d at 1304.

The official City policy relevant to this facts of this case is the HPD' s General Order Number 600-05 ("GO 600-05"), which defines the appropriate course of action for SWAT and HNT officers to follow in special-threat situations. (Instrument No. 36-12). According to GO 600-05, a special-threat situation exists in any situation involving a barricaded suspect. A barricaded suspect is defined as a person who has demonstrated the capability or intent to "cause death or serious bodily injury to any person, including himself" and "has achieved a tactical superiority by the use of a physical obstruction." (*Id.*, at 1). GO 600-05 also outlines the appropriate plan of action and procedures

to follow in situations involving barricaded suspect, and requires that SWAT and/or HNT officers take action. (*Id.*).

Expert testimony submitted by both parties establishes that the City's official policy with respect to "special-threat situations," as outlined in GO 600-05, is not unlawful and was not the moving force behind the alleged Constitutional violations. Defendant's expert witness, Michael Dirden ("Dirden"), Assistant Chief for the HPD, stated that he is familiar with HPD policies and procedures, and their day to day applications. (Instrument No. 29-2, at 1). Dirden held that the alleged unlawful entry, unreasonable search and seizure, and excessive force were not "the result of any HPD policy or practice which allows the same." (*Id.*, at 10). Additionally, Plaintiffs' expert witness Dr. Kirkam unequivocally testified that the City's policies are not problematic and were not the moving force behind Esparza's death. (Instrument Nos. 29-3, 29-7). Rather, Dr. Kirkam testified that Captain Williams's decision allowing entry into the Valles' home violated the City's official policy, GO 600-05. (Instrument No. 29-5, at 3). Dr. Kirkam also stated that Captain Williams's failure to call SWAT and HNT to the scene of the incident were violative of GO 600-05 and caused Esparza's death. (*Id.*; Instrument No. 29-7, at 2).

Additional evidence indicates that although GO 600-05 applied to the situation, Captain Williams did not follow the procedures outlined by GO 600-05 when he allowed Sergeant Bryant's assault team to enter the Valles' home. (Instrument No. 29-2, at 8-10; Instrument No. 36-16, at 8). Dirden concluded that "Captain Williams violated General Order 600-05

when he failed to properly evaluate a special-threat situation and ensure the appropriate department response." (Instrument No. 29-2, at 8-9). Dirden further opined that Captain Williams failed to exercise sound judgment with respect to the incident at the Valles' home on January 7, 2007. (*Id.*).

Captain Williams testified that he did not adhere to GO 600-05 on January 7, 2007 because he did not believe that a "barricaded suspect special-threat scene" existed. (Instrument No. 36-5, at 4). He testified that he would have sent the SWAT and HNT officers to the scene, per GO 600-05, rather than allowing the assault team to enter the Valles' home, if he had believed that a special-threat situation was present. (*Id.*). Ana Cummings ("Cummings"), Grievance Examiner for classified employees of the City of Houston, agreed that Captain Williams did not follow GO 600-05, but that he was justified in doing so because he "acted within what he thought were the facts of the situation and the policies and procedures he had to guide him" (Instrument No. 36-16, at 11-12).

Captain Williams's assessment of the situation on January 7, 2007, whether correct or incorrect, is probative only of his belief whether GO 600-05 applied to the incident, not of the legality of GO 600-05. His failure to follow GO 600-05 does not support Plaintiffs' assertion that official City policies or custom caused the alleged Constitutional violations. Moreover, as Captain Williams did not adhere to GO 600-05, the City's very policy regarding "special-threat situations" and barricaded suspects, then GO 600-05 certainly could not have been the moving force behind Plaintiffs' and Esparza's alleged Constitutional injuries.

In sum, the Court finds that there is no evidence indicating that an official City "policy statement, ordinance, regulation, or decision" resulted in the alleged Constitutional violations.

2.

Second, the Court considers whether Captain Williams' decisions on January 7, 2007 were made pursuant to an informal policy, or a "persistent, widespread practice of city officials or employees, which . . . is so common and well-settled as to constitute a custom that fairly represents" City policy. *Eugene v. Alief Indep. Sch. Dist.*, 65 F.3d at 1304. Here, Plaintiffs have not offered evidence of other instances in which the HPD may have unconstitutionally entered a home, attempted to seize an individual, or used excessive force, as Plaintiffs allege occurred on January 7, 2007 at the Valles' home. Evidence of a single incident is insufficient to establish the requisite pattern. Accordingly, there is no evidence that Captain Williams's decision to allow entry into the Valles' home was part of a "persistent, widespread practice of city officials or employees."

3.

It is well established that "a single unconstitutional decision by a municipal actor may give rise to municipal liability if that actor is a final policymaker." *Bolton v. City of Dallas,* 541 F.3d 545, 548 (5th Cir. 2008); *see Bd. of the County Comm'Rs v. Brown,* 520 U.S. 397, 405 (U.S. 1997) ("a final decisionmaker or policymaker's adoption of a course of action tailored to a particular situation and not intended to control

decisions in later situations may give rise to municipal liability.").

Here, Plaintiffs allege that Captain Williams was a policymaker for the City of Houston, and that his decision allowing entry into the Valles' home was the moving force behind Plaintiffs' and Esparza's Constitutional injuries. (Instrument No. 36, at 12-13). Defendant, on the other hand, contends that Captain Williams was not a policymaker for the City of Houston, and therefore his actions cannot give rise to municipal liability. (Instrument No. 43, at 1-4).

The relevant inquiry is whether Captain Williams bore policymaking authority for the City of Houston. A policymaker for a municipality is one who bears "the responsibility for making law or setting policy in any given area of a local government's business." *Bolton,* 541 F.3d at 550 (citing *City of St. Louis v. Praprotnik,* 485 U.S. 112, 125 (1988)). This inquiry must be specific to the particular action at issue. *Bolton,* 541 F.3d at 548.

The Fifth Circuit has drawn a distinction between decision making authority and final policymaking authority, which is required for municipal liability. *Bolton,* 541 F.3d at 548-49. In doing so, the Fifth Circuit has rejected the approach that "would permit policy or custom to be attributed to the city itself by attribution to any and all officers endowed with final or supervisory power or authority." *Id.* (citing *Jett v. Dallas Indep. Sch. Dist.,* 7 F.3d 1241, 1248 (5th Cir. 1993)). Final or supervisory authority does not automatically confer policymaking authority, as the finality of an official's action "does not automatically lend itself the character of policy." *Id.* ("[N]either

complete discretionary authority nor the unreviewability of such authority automatically results in municipal liability. There must be more."). Policymaking authority involves legislative responsibilities, as opposed to executive or administrative responsibilities. *Id.*, at 550

Plaintiffs aver that Captain Williams had been delegated policymaking authority by the Police Chief pursuant to City Code of Ordinances, Chapter 34. (*Id.*, at 15). The City Code of Ordinances, Section 34-22 ("Section 34-22") states that the chief of police is the "executive officer and director of the police department." HOUSTON, TEX., CODE OF ORDINANCES, § 34-22. Section 34-23 maintains that the chief of police shall "promulgate administrative rules and regulations of the police department" and Section 34-24 allows the chief of police to "designate one of the persons holding the rank of assistant chief of police to discharge his duties during any time that the chief . . . may be absent." HOUSTON, TEX., CODE OF ORDINANCES, §§ 34-23, 34-24. (Instrument No. 36, at 16). According to Plaintiffs, Section 34-24's designation of duties conferred policymaking authority on Captain Williams on January 7, 2007, because the chief of police was not at the scene of the incident and Captain Williams was the senior officer involved. However, Plaintiffs conflate policymaking authority with decisionmaking authority. Chapter 34 of the City Code of Ordinances indicates that the chief of police may discharge the authority to make executive decisions and promulgate administrative rules and regulations, in his absence. Even if the chief of police had discharged this authority to Captain Williams on January 7, 2007, which is not established by the evidence, Chapter 34

does not allow the chief of police to discharge policymaking authority to Captain Williams.

Plaintiffs further contend that Captain Williams had been conferred policymaking authority by GO 600-05. (*Id.*, at 15). According to GO 600-05, the "operational commander for a special-threat situation will be the senior officer in the Tactical Operations Division's chain of command and may be one of the following: (a) the assistant chief of the Tactical Support Command, (b) the captain of the Tactical Operations Division, or (c), a designee." (Instrument No. 36-12, at 3). Plaintiffs argue that because Captain Williams was the Captain of Tactical Operations and the operational commander for the incident pursuant GO 600-05, he was the designated policymaker on January 7, 2007. (Instrument No. 36, at 17). However, the Court does not find that the operational command conferred by GO 600-05 equates final policymaking authority. *See Moore v. Dallas Indep. Sch. Dist.*, 2008 U.S. Dist. LEXIS 96160, at *16-17 (N.D.Tex. Nov. 24, 2008). Captain Williams's actions and decisions on January 7, 2007 did not constitute policy for the City of Houston and cannot give rise to municipal liability.

In sum, there is no evidence that the incident on January 7, 2007 at the Valles' home was conducted pursuant to an official City policy or custom, was part of a persistent, widespread practice, or was brought about by the actions of a final policymaker for the City of Houston. Defendant City of Houston's policies or customs were not the moving force behind the alleged violations of Plaintiffs' or Esparza's Constitutional rights. Defendant's Motion for Summary Judgment with respect to Plaintiffs' municipal liability claims

against the City of Houston is GRANTED. (Instrument No. 29).

C.

Plaintiffs allege that the HPD officers who entered their home on January 7, 2007 negligently deployed a taser weapon, in violation of Chapter 101 of the TCPRC. (Instrument No. 1, at 9). Plaintiffs argue that the taser is an intermediate weapon to be used before lethal force, and that Officer Walsh fired his taser "from a distance too far away to hit the target" and consequently "failed to put himself in the right position to make his weapon an intermediate weapon to be used in lieu of the lethal weapon." (Instrument No. 36, at 22-23). Plaintiffs further aver that Officer Walsh was "tardy on the scene" and may have fired his taser even *after* the use of lethal force. (*Id.*, at 22-23). Plaintiffs allege that Esparza's death was caused by the Officer Walsh's failure to use his taser properly. (*Id.*).

Defendant moved for summary judgment on Plaintiffs' negligence claim. (Instrument No. 29, at 22). Defendant argues that there is no evidence that the weapons at issue malfunctioned or that the officers used them negligently. (*Id.*). Defendant further asserts that Plaintiffs have not established causation. (*Id.*). Finally, Defendant contends that it is subject to qualified immunity on this claim.

In Texas, a governmental unit is immune from suit and liability unless the state consents. *Dallas Area Rapid Transit v. Whitley,* 104 S.W.3d 540, 542 (Tex. 2003). In a suit against a governmental unit, the plaintiff must allege that a valid waiver of immunity.

Id. Here, Plaintiffs assert that immunity is waived pursuant to Section 101.021 of the Texas Tort Claims Act. (Instrument No. 36, at 22). According to Section 101.021, a governmental unit can be held liable for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the Claimant." TEX. CIV. PRAC. & REM. CODE § 101.021(2). A city is considered a governmental unit under the Texas Tort Claims Act. Tex. Civ. Prac. & Rem Code § 101.001(3)(B).

For the City of Houston' s governmental immunity to be waived pursuant to Section 101.021, Esparza's death must have arisen from the "condition or use" of the taser gun. *See Anderson v. City of San Antonio,* 120 S.W.3d 5, 7 (Tex. App. San Antonio 2003). "Use" has been defined by the Texas Supreme Court as "to put or bring into action or service; to employ for or apply to a given purpose." *Whitley,* 104 S.W.3d at 542 (citing *Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg,* 766 S.W.2d 208, 211 (Tex. 1989)). Texas courts have also construed "use" to include "nonuse." *Hale v. Sheikholeslam,* 724 F.2d 1205, 1208 (5th Cir. Tex. 1984). Additionally, it is not necessary for Plaintiffs to plead that defective personal property caused the injury. "If nondefective property is alleged to have been used or misused by an officer acting within the scope of employment so as to cause the injury, a cause of action is stated." *Id.*

Here, the evidence shows that a taser was fired by Officer Walsh at some point during the incident inside the Valles' home, but the taser darts did not hit Esparza. (Instrument No. 36, at 22). Therefore, it is undisputed that Esparza's death was not caused by the

nonuse of Officer Walsh's taser gun. Esparza's death also could not have been caused by Officer Walsh's *use* of this taser gun, as it was Officer Chaisson's firearm that ultimately shot him. (*Id.*). Additionally, there is no evidence that either the taser gun or the firearm was in defective or malfunctioning condition, or that the condition of the taser gun caused Esparza's death. The only remaining possible allegation under Section 101.021 is that Esparza's death was caused by Officer Walsh's misuse of the taser gun.

Officer Walsh testified that after Sergeant Bryant shot Esparza with beanbags, Esparza continued to step forward towards the officers a "couple of more feet." (Instrument No. 36-11, at 18-19). Officer Walsh then aimed towards Esparza with the taser gun from a distance of about ten feet, but missed because "he is moving fast . . . you can't shoot at a moving target." (*Id.*). Instead of hitting Esparza, the tasers "stuck in the wall behind him." (*Id.*). Officer Walsh stated that he did not fire his taser a second time because "there wasn't enough time to reload." (*Id.*).

Plaintiffs bring a number of unsubstantiated allegations that Officer Walsh negligently misused the taser gun by not firing it from the correct location and perhaps having fired it after Officer Chaisson fired the firearm. (Instrument No. 36, at 22-23). However, even accepting Plaintiffs' factual assertions as true, Plaintiffs have not established that Officer Walsh's negligence, if any, caused Esparza's death. Texas law has "consistently required a nexus between the use [or condition] of tangible property and the plaintiff's injuries." *See Anderson,* 120 S.W.3d at 7 (citing *Whitley*, 103 S.W.3d at 543). The condition or use of tangible property "does not cause injury if it does no

more than furnish the condition that makes the injury possible." *Id.* There is no evidence in the record that Esparza's death resulted from the condition or use of the taser gun that would result in the waiver of governmental immunity.

The Court does not find that governmental immunity has been waived with respect to Plaintiffs' negligence suit under Section 101.021. Accordingly, Plaintiffs' negligence claim is barred by immunity and Defendant's Motion for Summary Judgment with respect to Plaintiffs' negligence claim under Texas law is GRANTED. (Instrument No. 29).

IV.

Defendant's Motion for Summary Judgment is **GRANTED. (Instrument No. 29).**

Neither Defendant's Motion for Summary Judgment nor this Order address Plaintiffs' failure to train claim, which was added by amendment on October 22, 2008. (Instrument No. 56). Pursuant to the Court's October 22,2008 scheduling order, parties must submit any dispositive motions on this additional claim by April 1, 2009. (Instrument No. 57).

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 24th day of March, 2009, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA . GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-20624

[Filed September 15, 2010]

JOSE VALLE, Individually and as Representative of the Estate of Omar Esparza; ASUNCION VALLE,	)
Plaintiffs - Appellants	)
v.	)
CITY OF HOUSTON,	)
Defendant - Appellee	)

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before JOLLY and GARZA, Circuit Judges, and STARRETT*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

**District Judge of the Southern District of Mississippi, sitting by designation.*

APPENDIX E

General Order Houston Police Department	ISSUE DATE: February 17, 1995	NO. 600-05
	REFERENCE: Supersedes General Order, 600-05, 600-05, 600-28, with various dates	

SUBJECT: SPECIAL THREAT SITUATIONS

PURPOSE

It is the policy of the Houston Police Department that the Special Weapons and Tactics (SWAT) Detail and the Hostage Negotiation Team (HNT) will be used in all special-threat situations as defined in this General Order. The goal in such situations is the safe release of all hostages and the successful termination of the operation without the loss of life.

The saving of human life, whether it is the life of the hostages, suspects, involved police officers or other innocent persons, is the primary goal in dealing with special-threat situations.

1 DEFINITIONS

Special Threat Situation. Any situation involving a sniper, a barricaded suspect with or without hostages, threatened suicides, or any terrorist activity.

Sniper. Any person who causes or attempts to cause death or bodily injury to other persons by discharging a firearm from an initially concealed position.

Barricaded Suspect. Any person who:

a. Has demonstrated capability and/or stated the intent to cause death or serious bodily injury to any person, including himself, and

b. Has achieved tactical superiority by the use of a physical obstruction (e.g., a building, an open field, a vehicle, any natural or man-made barrier, etc.).

Hostage Situation. Any incident where the possibility exists or the available information indicates that a barricaded suspect may be holding a hostage.

Terrorist Activity. Any in-progress act that creates or is designed to create the fear of death or imminent bodily injury in the minds of others.

Debriefing/Interviewing. Questioning designed to obtain all useful information for a formal report.

Inner Perimeter. The area of containment closest to the suspect.

Outer Perimeter. The area of containment the prevents outsiders from interfering with or being endangered by the threat situation.

Objective. The physical location where a barricaded suspect or hostage is believed to be located.

2 GENERAL GUIDELINES

When informed that a possible special-threat situation exists, the dispatcher will immediately direct a field patrol supervisor to respond to the scene. Simultaneously, the dispatch supervisor will insure that the Command Center is aware of the possible special-threat situation. After a patrol supervisor goes to the scene and verifies a special-threat situation exists, the dispatch supervisor will call the Command Center and provide all available information. The Command Center Division (CCD) will then be responsible for making all necessary notifications to ensure the proper departmental resources are activated.

The police response to all special-threat situations will be measured in proportion to the level of threat to life and the public safety. Ex: threatened suicide, where no other person is in danger, might require only the HNT as opposed to the SWAT Detail.

[PAGE: #2]

3 PLAN OF ACTION

The success of any special-threat situation plan depends on teamwork, good communication, and the coordination of tactical maneuvers by one commander. Although any resource of the department may be used to resolve a special-threat situation, the primary teams included in the department's special threat response are:

a. Patrol officers and field supervisors.

b. Tactical Operations Division, which includes:

   1. Special Weapons and Tactics Detail (SWAT)

   2. Hostage Negotiation Team (HNT).

c. Special Operations Division.

Patrol Officers

The first officers to arrive at the scene, usually patrol officers, will:

a. Notify the dispatcher that a possible special-threat situation exists, and request a patrol supervisor.

b. Confine the suspect to the smallest area possible, by establishing an inner perimeter.

c. If possible, determine if telephone service is available within the objective. Avoid face to face communication with the suspect.

d. Maintain communications with the suspect only if it stabilizes the situation, but avoid constantly contacting the suspect who refuses to communicate or answer.

e. Stabilize the emotionally distraught or violent suspect by doing the following, if communications are established:

   1. Communicate by telephone if possible.

   2. Express a willingness to help through positive statements and avoid threatening or intimidating remarks.

   3. Do not beg or plead with the suspect or agree to any demands made by the suspect.

f. Relay, via Mobile Data Terminal (MDT) or telephone, the following information to the dispatcher as soon as it becomes available:

   1. Description of the suspect and any weapon(s).

   2. Location and number of hostages.

   3. Possible avenues of escape.

   4. Location to where additional units should respond, and safe travel routes.

g. Detain all witnesses for interviewing by Tactical Operations Division personnel.

h. Upon being relieved, immediately report to the SWAT command post for debriefing.

i. Remain at the scene until debriefed and release by the operation commander or by the senior Homicide Division representative if Homicide Division personnel have been dispatched to the scene.

Unit Originally Assigned to the Call

The uniformed unit originally assigned to the call by the dispatcher is responsible for making the original offense report and filing charges when necessary. If this unit is unable to remain at the scene, the unit may be relieved by the on-scene supervisor after the following has occurred:

a. The original offense report including all details up to the time Tactical Operations personnel took control of the scene has been completed and left with the patrol supervisor or with the relief unit.

b. The patrol supervisor has assigned another patrol unit to replace the original unit. This replacement unit will stand by to take custody of any prisoner, file charges when necessary, and supplement the original offense report.

[PAGE: #3]

If the circumstances warrant having Homicide Division personnel handle the original offense report, the uniform officers need only supplement the report as required by the Homicide Division investigators.

Patrol Sergeant

The first patrol supervisor on the scene, usually a patrol sergeant, will:

a. Confirm that a special-threat situation exists and request the dispatcher to notify Tactical Operations personnel.

b. Give the dispatcher all pertinent information about the special-threat situation (e.g., the correct location, the number of suspects, and the number of hostages) as soon as this information becomes available.

c. Contact the CDC to request the HNT when necessary.

d. Establish and supervise a temporary mobilization point to which all patrol personnel will report for assignments, briefing, and debriefing.

e. Provide a diagram of the outer perimeter showing the radio numbers and locations of all patrol units along the perimeter to the operational commander.

Patrol Captain or Duty Lieutenant

The area captain, or duty lieutenant will do the following:

a. Go to the scene and assume overall command of operations until relieved by the operational commander.

b. Insure the area patrol officers man the outer perimeter until relieved by officers of the Special Divisions Unit.

c. Insure the establishment of a temporary command post and a press information center.

d. Insure that the City Wide radio channel is used to establish communication with Tactical Operations Division personnel responding to the scene.

Special Operations Division

During all special-threat situations, officers from the Special Operations Division may be requested to maintain the outer perimeter.

Chronology of Events

The operational commander for a special-threat situation will be the senior officer in the Tactical Operations Division's chain of command and may be one of the following:

a. The assistant chief of the Tactical Support Command.

b. The captain of the Tactical Operations Division.

c. A designee.

Upon arrival, the operational commander will:

a. Coordinate the establishment of the outer perimeter boundaries.

b. Establish a mobilization point, a command post headquarters, and a press information center along the perimeter boundaries.

Upon their arrival at the scene, SWAT personnel will relieve the patrol officers containing the situation, establish the inner perimeter, and continue to evacuate the area. The operational commander will determine which containment and assault tactics to use. SWAT officers will be the only persons authorized to discharge firearms after the perimeter has been established.

4 CALL-UP/NOTIFICATION PROCEDURES

Emergency Communications Division

After notification by a patrol supervisor of a special-threat situation, the dispatcher will:

a. Attempt to obtain a telephone number which will enable a Tactical Operations supervisor to speak directly to the involved patrol supervisor at the scene.

* * *

APPENDIX F

STANDARD OPERATING PROCEDURES

TACTICAL SUPPORT COMMAND
TACTICAL OPERATIONS DIVISION/SWAT DETAIL

CATEGORY: OPERATION	DATE ISSUED: 10/30/87	EFFECTIVE DATE: 01/01/88	PROCEDURE NUMBER 200/1.01
SECTION: SPECIAL THREAT SITUATION	DATE OF REVISION: 06/01/06	REVISION NUMBER: 3	PAGE NUMBER: 1 OF 1
SUBJECT/EVENT: NOTIFICATION PROCEDURES FOR SWAT TEAM RESPONSE			

RESPONSIBILITY:

To establish a procedure by which SWAT team members are notified of special threat situations and high risk warrants.

TASKS

1. The command Center will contact the captain of the Tactical Operations Division or designee regarding any special threat situation. The captain will determine whether a full, partial or no SWAT response is appropriate.

2. The captain or designee will begin notification procedures by having the group paging system activated.

   A. Upon notification of a special threat situation, the lieutenant will insure that the Command Center has designated a channel for responding SWAT members.

   B. Lieutenant will advise the dispatcher to have the supervisors and units on the scene switch to the designated channel.

   C. Lieutenant will have the dispatcher ascertain a safe route to the scene for broadcasting to responding SWAT members.

   D. Lieutenant will designate a sergeant to assign officers to drive the armored vehicle and command post to the scene.

   E. Lieutenant will determine whether a full, partial, or no Non-Tactical Operations Division (Non-TOD) SWAT response is appropriate.

3. All SWAT members will notify the dispatcher when the are enroute to the scene and when they have arrived.

REFERENCES:

Form No. HPD-00087

APPENDIX G

Houston Police Department

Crisis Intervention Team

Training Proposal

Patrol Officers
Patrol Sergeants
Refresher Training
Cadets
Liaisons

Crisis Intervention Team Training Proposal

Prepared For:

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Prepared By:

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December 2004

Issue 1

Training All Officers in the Calls-for-Service Loop as CIT Officers

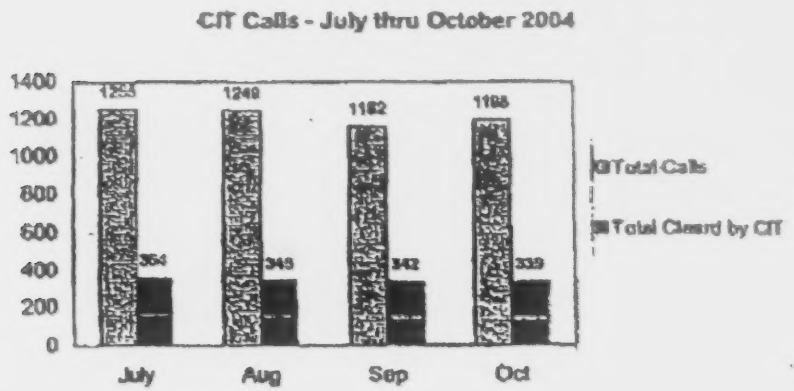
Rationale

PROMINENCE IN JEOPARDY: The Crisis Intervention Team (CIT) training is a proven curriculum for helping officers safely de-escalate situations involving individuals in serious mental health crises. Our program is the model for the state and one of the models nationally. Several law enforcement agencies have started CIT programs based on the success of our program. The Texas Commission on Law Enforcement has mandated 16 hours of basic CIT training in the Texas Basic Peace Officer Curriculum based on our model. The program is very successful at helping keep officers and mental health consumers safe and thus reduces liability in this very litigious area of law enforcement. We are in jeopardy of losing our status as the model for the state and a national model because of an under-utilization of our program.

UNDERUTILIZATION OF OUR PROGRAM: This training is very effective. It is only effective, however, when used. Most agencies with CIT programs dispatch between 80 to 90 percent of their CIT calls to CIT officers. In our department, that percent is 30. Non-CIT trained officers are clearing 70 percent of our CIT calls. These statistics have been remarkably constant since the inception of our program. The *Houston Chronicle*

has printed stories on the use of force in our department. In each article, the *Chronicle* has pointed out this under-utilization of our program.

Data obtained from HPD CAD report TBO37. Although data is for four months, it is representative of the percentages for the past four years. Percentages of calls cleared by CIT officers are: 29% July, 28% August, 29% September, and 28% October.



CIT OFFICERS NOT USED WHEN NEEDED MOST: Because of the queue time factor, we do not expect our dispatchers to take time to locate a CIT officer to respond to priority one and priority two CIT calls. Examples of these calls include suicide in progress and suicide just occurred. In other agencies, just the opposite occurs. These are the calls involving the highest level of crisis. Thus, these are the calls most in need of a CIT officer.

"Yet these efforts [to improve our response to the mentally ill] are diminished by key shortcomings, such as the failure to deploy crisis-trained officers when they are most needed. HPD records show that on average, the Crisis Intervention Team responded to less than 27 percent of the calls for a CIT member received in the last six months of 2004."

-Article "Tense Encounters, Fatal Results" in the *Houston Chronicle*, January 18, 2004

REASONS FOR UNDERUTILIZATION: The reason for this under-utilization of our program is twofold: CIT officers do not volunteer for CIT calls and dispatchers do not dispatch CIT calls to CIT officers. The following are three reasons for this:

- **COMPENSATION:** Our CIT officers do not receive compensation for participating in this program. Most do not mind checking by on CIT calls, but they do not feel they should be dispatched as the primary unit. The number of CIT calls has been increasing over the past few years and CIT officers feel they are running more calls than other officers, making more reports, and thus being penalized for volunteering for the program. The more we need these officers, the less they volunteer to run these calls. Most agencies with CIT programs provide monetary compensation to their CIT officers. When compensated, the officers have an incentive to volunteer for these calls and the agency can demand more of the officers.

NOTE: The objective of the CIT program is to have the officers with this specialized training dispatched as the primary units to CIT calls whenever possible. We want the officers with the training on the scene from the beginning because these situations can go "bad" very quickly and we want to de-escalate from the very start.

- **DISPATCH WORKLOAD:** The average dispatcher's workload on our department is very heavy. CIT calls account for a very small number of their calls. CIT is not in the forefront of the dispatcher's mind. Dispatchers tend to treat CIT calls like any other call, i.e., general broadcast the call and dispatch it to the unit that volunteers regardless of specialization.

- **QUEUE FOR PRIORITY ONE AND TWO CALLS:** Together, priority one "suicide in progress" calls, priority two "suicide just occurred," and priority two "disturbance/ mental case/weapon" calls account for approximately half of our CIT calls. Because of the high priority of these calls, the high volume of them, and the short time they may remain in queue, our policy has always been not to further pressure the dispatcher into locating CIT officers for these calls. Ironically, in almost every other agency, these are the calls with the highest priority for dispatch to CIT officers. In these other agencies, nearly 100 percent of these calls are dispatched to CIT officers because the involve the most acute crises and require

> officers with the highest level of skill. In our agency, non-CIT officers are clearing over 70 percent of these high-risk, acute crisis calls.

A POTENTIAL LIABILITY: We know CIT training works to help de-escalate crises and helps keep officers and mental health consumers safe. Having such a high percentage of CIT calls cleared by non-CIT officers is a potential liability for the department. If we dispatch a non-CIT officer to a CIT call and the officer shoots and kills the mental health consumer, the community will ask why we didn't use a CIT officer. We could be liable if a CIT officer was available but not used. We could also be liable for not providing adequate training to the non-CIT officers who we know are responding to a high percentage of our CIT calls.

> "Two of the most common civil suits brought against law enforcement leaders are failure to properly supervise and failure to provide adequate training."
>
> *-FBI Law Enforcement Bulletin*, July 2004

NON-CIT OFFICERS WILL ALWAYS RESPOND: Even if we dispatched 100% of our CIT calls to CIT officers, there are many more calls involving individuals in serious mental health crises that are not coded CIT. There are many reasons for this: inadequate information provided to the call taker, human error on the part of the call taker, lack of knowledge by the person making the call, etc. Non-CIT trained officers will always

respond to calls involving individuals in serious mental health crises.

TRAINING APPLICABLE IN ALMOST ANY SITUATION: Although the primary emphasis of the program is mental illness, the communication, active listening, and other less authoritative tactics and techniques taught in this class are directly applicable in almost any situation a law enforcement officer finds him or herself. Many officers taking this class stated it was the best training they received in their law enforcement careers. Many CIT officers and patrol supervisors have stated they believe all patrol officers should receive CIT training because it is effective, it makes a better officer, and it can be used in almost any law enforcement situation. Many members of the community and other law enforcement professionals agree.

> "The committee [Use of Force Committee] is going to present a list of recommendations to the mayor and the chief. One of the recommendations is to provide all patrol officers with the full 40-hour CIT training."
>
> -Justo Garcia, Director, Houston Field Office, Community Relations Service, USDOJ

> We have found the training so popular and beneficial we are training all classified officers on our department. We have received no negative feedback regarding this program. I believe all officers will benefit from it.

-Chief Gary Swindle, Tyler (TX) Police Department

BENEFITS OF TRAINING ALL OFFICERS IN CFSL: Training all officers in the calls-for-service loop would be beneficial for several reasons:

1) All officers will be adequately prepared to deal with individuals in serous mental health and other crises, including domestic violence and substance abuse situations.

2) We will reduce the department's liability in this very litigious area of law enforcement by ensuring that all officers are adequately trained to respond to all calls involving individuals with mental illness.

3) We will demonstrate to the community that this is an important issue with the department and we are doing everything in our power to prepare all officers to deal with this difficult, potentially volatile issue.

4) We will eliminate the need to invest the considerable time and effort currently spent analyzing calls-for-service data and call code information each month.

5) We will be the largest department in the nation to train all officers in the CFSL.

Methodology

24-HOUR CLASS: Our recommendation is to revise our 40-hour CIT curriculum to 24 hours.

We believe we can do this while maintaining the integrity of the training. The Tyler (TX) Police Department has done this with great success. The officers will continue to be eligible to receive their Mental Health Peace Officer certification through TCLEOSE. We will continue to include role-plays in the training, and we will continue to maintain all pertinent aspects of the training. The faculty will be a combination of HPD personnel and outside volunteer mental health professionals.

TRAINING HELD AT THE ACADEMY: Our recommendation is to continue to hold the training at the academy. The academy provides the resources necessary for this class: breakout rooms for role-play scenarios, audio-video equipment, parking for students and instructors, and access to testing materials and equipment. The outside guest instructors are also familiar with the academy as they have been training here for the past five years.

ONE CLASS OF 52 EVERY THREE WEEKS: Our recommendation is to have one officer from each shift from the 13 patrol divisions and one supervisor from each division attend each class. Each division would lose only three officers and one supervisor per class. By providing one class every three weeks, we would train 884 personnel in a calendar year.

Cost

NO OUT-OF-POCKET EXPENSES: There are no direct out-of-pocket expenses for this

training. The instructors are HPD personnel and volunteers from the community. The training materials, which are minimal, can be produced "in house" at the academy. Grant money is available for the purchase of testing materials (Scantron sheets).

* * *

Issue 2

Providing All Sergeants in the Calls-for-Service Loop with CIT Training.

Rationale

A POTENTIAL LIABILITY: Per General Order 500-12, **Persons Suspected of Mental Illness**, "A field supervisor and two police officers will respond to each incident." It is a potential liability to make supervisors responsible for situations in which they have less training than their subordinates. Supervisors should have as much, if not more, training than their subordinates.

> "Two of the most common civil suits brought against law enforcement leaders are failure to properly supervise and failure to provide adequate training."
>
> -*FBI Law Enforcement Bulletin*, July 2004

Due to the nature of these calls, regardless of policy, supervisors will always respond. This

training will better prepare supervisors to respond to individuals in crises.

Methodology

The patrol sergeants would attend the same class as the officers.

Cost

The cost would be the same as training for the officers.

Timeline

We could train all patrol sergeants, along with all patrol officers, in two years.

* * *

184

No. 10-801

Supreme Court, U.S.
FILED
MAR 21 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSE VALLE, *et al.*,

Petitioners,

v.

CITY OF HOUSTON, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What must plaintiffs show to establish deliberate indifference in a failure-to-train claim?

2. If an official has decisionmaking authority that is subject to review, can he be elevated to a policy-making authority?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF CASE 1

REASONS FOR DENYING THE WRIT 4

ARGUMENT 4

I. THE FIFTH CIRCUIT PROPERLY REQUIRES THE DEMONSTRATION OF A PATTERN OF CONSTITUTIONAL VIOLATIONS 4

A. This Court has provided clear guidance in determining whether a municipality shows deliberate indifference in a failure-to-train context 4

B. The Fifth Circuit properly required a showing of a pattern of constitutional violations to establish deliberate indifference 6

II. THE FIFTH CIRCUIT PROPERLY DISTINGUISHES DECISIONMAKING AUTHORITY FROM POLICYMAKING AUTHORITY ... 8

A. This Court has provided clear guidance in distinguishing decisionmaking authority from policymaking authority 8

TABLE OF CONTENTS – Continued

Page

B. The Fifth Circuit properly distinguished decisionmaking authority from policy-making authority 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Board of the County Commissioners v. Brown, 520 U.S. 397 (1997) 7

Brady v. Maryland, 373 U.S. 83 (1963) 7

City of Canton v. Harris, 489 U.S. 378 (1989) 5, 8

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) 8, 9

Connick v. Thompson, 553 F.3d 836, *reh'g en banc*, 578 F.3d 293 (2009), *cert. granted*, No. 09-571 (U.S. argued Oct. 6, 2010) 7

Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989) 8

McMillan v. Monroe County, 520 U.S. 781 (1997) 8

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 8

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, City of Houston, requests that this Court deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Fifth Circuit, and presents in support of its request:

STATEMENT OF CASE

Omar Esparza was fatally shot by Houston police officers after Mr. Esparza's family had called 911 because Mr. Esparza locked his family, including his parents, out of their home. Houston police officers, including a crisis intervention officer, arrived at the home. The officers talked to Mr. Esparza, but he refused to leave the house or let the officers into the house. Eventually, a four-man team, armed with soft impact weapons, Tasers, and firearms, made entry into the home through an unlocked door. Petitioners, who were plaintiffs and appellees below, Jose Valle, individually and as representative of the estate of Omar Esparza, and Asuncion Valle, alleged that the shooting violated the civil rights of their son, bringing a cause of action against the City of Houston without joining any of the individual officers involved in the incident.

Mr. Esparza began behaving in an unusual manner in late 2006. Although his family sought psychiatric treatment for Mr. Esparza, he had not yet

been treated. On Sunday, January 7, 2007, Mr. Esparza became upset after the family returned home from a local restaurant. Mr. Esparza went inside the family home and locked his family out. Eventually, petitioners called 911 for assistance.

The 911 dispatcher sent Houston Police Department (HPD) officers to respond to the call. HPD Officer J. Duarte arrived at the scene and began to talk to Mr. Esparza through the locked front door. HPD Officers S. Walsh, J.D. Seay and R. Chaisson also joined the conversation with Mr. Esparza after their respective arrivals. HPD Sergeant A.R. Bryant assumed control over the scene when he arrived. Sergeant Bryant also established communication with HPD Headquarters and was in contact with Captain D. Williams of the Special Weapons and Tactical/Hostage Negotiations Team (SWAT/HNT). HPD Officer C. Broussard, a crisis intervention team (CIT) specialist who was trained to deal with citizens with mental-health issues, also arrived at the scene.

Officer Broussard began to negotiate with Mr. Esparza at the front door, but ceased the discussion when Mr. Esparza was no longer willing to talk. Meanwhile, Sergeant Bryant had again spoken with Captain Williams about the situation and called the other officers at the scene together to discuss a plan for entering the home. When the officers entered the home, Mr. Esparza charged at the officers with a hammer. Sergeant Bryant discharged non-lethal soft-impact beanbags, but could not stop Mr. Esparza. Officer Walsh discharged his Taser, but the darts did

not make contact with Mr. Esparza. Officer Chaisson discharged his service pistol. Although some of the bullets missed Mr. Esparza, Mr. Esparza was fatally shot.

In 2004, HPD reviewed a proposal that recommended that all HPD patrol officers to complete twenty-four hours of CIT training and that all patrol sergeants complete CIT training. The purpose of this training was to make more CIT-trained officers available to respond to calls for service. The proposal suggested that if HPD dispatched "a non-CIT officer to a CIT call and the officer shoots and kills the mental health consumer, the community will ask why [HPD] didn't use a CIT officer" and that HPD "could be liable if a CIT officer was available but not used."

At the time of Mr. Esparza's death, (1) not all other police departments certified all of their officers in CIT; (2) there was no "industry" standard of certifying all patrol officers and/or sergeants in CIT; (3) the training provided by HPD was comparable to, if not superior to, that provided by other police departments; and (4) the training provided by HPD exceeded that required by the Texas Commission on Law Enforcement Officer Standards and Education (TECLOSE). The City's policy on CIT training did not fall short of the requirements of the State of Texas nor was inferior to the training provided by other police departments such as those in Los Angeles, Memphis, Denver, or Seattle. Not only did HPD's CIT training follow national standards, but certifying all

officers in CIT was not a universally accepted practice because of differences in policing philosophies.

Neither the district court nor the court of appeals concluded that a policymaker could be charged with actual or constructive knowledge of the alleged inadequacy of the CIT training, but rather noted that there was a question of fact regarding whether the decision not to implement the 2004 proposal constitute an official policy or custom of inadequate CIT training, of which a policymaker had actual knowledge. Instead, both courts recognized there is no constitutional right to have a CIT call answered by non-CIT-trained officers, that a shooting death was not the highly predictable consequence of the alleged failure to train, and that the City was not deliberately indifferent.

The courts below also recognized that Captain Williams was not a final policymaker who possessed final authority to establish municipal policy, but was rather a decisionmaker who exercised his discretion in carrying out the City's policy.

REASONS FOR DENYING THE WRIT

The Fifth Circuit properly required a demonstration of a pattern of violations to establish municipal liability because the alleged lack of training did not lead to obvious constitutional violations. The decision below regarding decisionmaking and policymaking

authority was a plainly correct application of settled law and does warrant review by this Court.

ARGUMENT

I. THE FIFTH CIRCUIT PROPERLY REQUIRES THE DEMONSTRATION OF A PATTERN OF CONSTITUTIONAL VIOLATIONS

A. This Court has provided clear guidance in determining whether a municipality shows deliberate indifference in a failure-to-train context.

This Court has explained that "in light of the duties assigned to the specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). To establish deliberate indifference, the plaintiff must show a pattern of similar violations that would make it obvious that more training is necessary or that the need for training is obvious based on the nature of the conduct at issue and the potential for harm. *See id.* The deficiency in training must be the actual cause of the constitutional violation.

B. The Fifth Circuit properly required a showing of a pattern of constitutional violations to establish deliberate indifference.

The training that petitioners complain the City failed to provide was CIT training to all patrol officers and all patrol sergeants. However, there is no constitutional right to have a CIT-trained officer respond to a CIT call nor is it constitutional violation for a non-CIT-trained officer to respond to a CIT call.

Even assuming the Fifth Circuit correctly found that the City was aware for a potential for constitutional violations in situations involving mentally ill persons where non-CIT-trained officers responded to a call, there was no link to show deliberate indifference. The proposal noted that more than 70 percent of all CIT calls had been cleared by non-CIT-trained officers but there is no indication that any of those calls actually resulted in any constitutional violation similar to that which petitioners suffered or any constitutional violations at all. Likewise, there is no indication that the other mentally ill citizens who were unarmed or carrying objects and shot by HPD officers involved the use of excessive force. The CIT training proposal did not address any potential specific or obvious constitutional violations. An officer who had not received formal CIT training or was not trained in de-escalating a situation with a mentally ill person would not automatically violate any constitutional rights of any mentally ill person with whom the officer interacted. Because the potential for

specific harm as a result of the actions of non-CIT-trained officers is not clear, deliberate indifference must be demonstrated through a pattern of violations that makes it obvious to the policymakers that more training is necessary. *Id.*

In contrast, the very training that is the subject of *Connick v. Thompson*, 553 F.3d 836, *reh'g en banc*, 578 F.3d 293 (2009), *cert. granted*, No. 09-571 (U.S. argued Oct. 6, 2010), focused on a very specific, well-defined policy, which if violated, would automatically result in a constitutional violation. An assistant district attorney who was not trained in the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), however, would infringe on a criminal defendant's civil rights. The circumstances under which a failure-to-train claim can succeed without showing a pattern of constitutional violations is very narrow. *Board of the County Commissioners v. Brown*, 520 U.S. 397, 409 (1997).

The courts below did not stray from this Court's guidance by requiring petitioners to show a pattern of violations here because there was no evidence that the HPD officers would automatically violate citizens' rights if they did not receive CIT training. Although the City knew that mentally ill citizens had been shot by HPD officers, there is no indication that the City knew whether these officers were CIT-trained or whether these shootings were uses of excessive force. Thus, because the need for training was not obvious, the Fifth Circuit properly required a showing of a pattern of constitutional violations to establish

deliberate indifference in accordance with *City of Canton*, 489 U.S. at 390.

II. THE FIFTH CIRCUIT PROPERLY DISTINGUISHES DECISIONMAKING AUTHORITY FROM POLICYMAKING AUTHORITY

A. This Court has provided clear guidance in distinguishing decisionmaking authority from policymaking authority.

This Court has explained that a municipal policymaker is one who has "the responsibility for making law or setting policy in any given area of a local government's business." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 125 (1988). "Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action order." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986). Whether the decisionmaker may be considered a final policymaker for purposes of imposing municipal liability is a question of state and local law which is best decided by the Court of Appeals. *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 738 (1989). This requires the examination of "the actual function of a government official, in a particular area, [which] will necessarily be dependent on the definition of the official's function under relevant state law." *McMillan v. Monroe County*, 520 U.S. 781, 786 (1997).

Whether a subordinate's decision may be elevated to a policymaking decision depends on whether

the subordinate's decision is constrained by policies and whether the subordinate's decision is subject to review by the municipality's authorized policymakers. *Praprotnik*, 485 U.S. at 127.

B. The Fifth Circuit properly distinguished decisionmaking authority from policymaking authority.

The Fifth Circuit properly considered state and local law within this Court's framework in determining that Captain Williams was a decisionmaker rather than a final policymaker. Captain Williams' actions were not final. The approach that petitioners suggests would result in *respondeat superior* liability and confuses the distinction between decisionmaking authority and final policymaking authority. *See id.* at 126 ("If the mere exercise of discretion by an employee could give rise to [liability for] a constitutional violation, the result would be indistinguishable from respondeat superior liability.").

Although Captain Williams had the authority to use his discretion in how to handle special threats on a day-to-day basis, he was constrained by the policies officially set forth in the HPD General Orders. As a police captain, Captain Williams had been delegated discretion in carrying out policy as outlined in the General Orders and Standard Operating Procedures.

Captain Williams' actions were also subject to review by the Chief of Police as petitioners concede that Captain Williams was disciplined by HPD. The

fact that Captain Williams had made these types of decisions routinely does not preclude the fact that his decisions were still subject to review as there is no requirement that every decision actually be reviewed to be considered "subject to review." Thus, there is no indication that the City attempted to delegate decisionmaking authority without reviewing Captain Williams' actions. The policymaker concluded that Captain Williams violated policy. That Captain Williams' discipline was ultimately overturned by a civil service examiner because he had "acted within the policies and procedures of the police department" further demonstrates that his actions were subject to the policies promulgated by a policymaker who was not the decisionmaker.[1]

The decision below regarding decisionmaking and policymaking authority was a plainly correct application of settled law and does warrant review by this Court.

---

[1] There is no suggestion that the Civil Service Hearing Examiner is the policymaker.

CONCLUSION

For the reasons given above, the petition should be denied.

Dated: March 21, 2011
Houston, Texas

Respectfully submitted,

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184

No. 10-801

Supreme Court, U.S.
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MAR 29 2011
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In the
Supreme Court of the United States

JOSE VALLE, INDIVIDUALLY, AND AS REPRESENTATIVE OF THE ESTATE OF OMAR ESPARZA, AND ASUNCION VALLE,
Petitioners,

v.

THE CITY OF HOUSTON, TEXAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY 1

I. The City does not dispute that other circuits would not require a showing of a pattern of actual violations to establish deliberate indifference here. 1

II. The City does not dispute that other circuits would have concluded that the delegation of authority here made the decisionmaker a policymaker. 3

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

City of Canton v. Harris,
489 U.S. 378 (1989) 2

City of St. Louis v. Praprotnik,
485 U.S. 112 (1988) 3

Myers v. City of Cincinnati,
14 F.3d 1115 (6th Cir. 1994) 5

Pembaur v. City of Cincinnati,
475 U.S. 469 (1986) 3, 5, 6

Young v. City of Providence,
404 F.3d 4 (1st Cir. 2005) 1

OTHER AUTHORITIES

Steven Cushman, *Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker*, 34 B.C. L. Rev. 693 (1993) 4, 5

Note, *Thompson v. Connick: The Fifth Circuit Tiptoes Around the Issue of Qualified Prosecutorial Immunity and Collapses Municipal and Vicarious Liability Under § 1983*, 84 Tul. L. Rev. 1403 (2010) 2

REPLY

The City's Opposition does not dispute the circuits' conflicting treatment of both questions presented. The City simply contends that the Fifth Circuit's approach is correct. That suggests that this Court's review is warranted on these recurring issues. Moreover, the City's defense of the Fifth Circuit's approach reveals that circuit to be straying from the proper principles of municipal liability under § 1983. Certiorari should be granted.

I. The City does not dispute that other circuits would not require a showing of a pattern of actual violations to establish deliberate indifference here.

As noted in the petition, other circuits recognize that the fundamental issue in failure-to-train cases is whether the municipality was aware of the likelihood for constitutional violations. Pet. at 9–11. For these circuits, establishing a prior pattern of actual violations is simply one permissible way to show the municipality was aware of that likelihood. *Id.*; *e.g.*, *Young v. City of Providence*, 404 F.3d 4, 28–29 (1st Cir. 2005) ("Although there was no evidence of a prior friendly fire shooting, a jury could find from the testimony of [officials] that the department knew that there was a high risk that absent particularized training on avoiding off-duty misidentifications, and given the department's always armed/always on-duty policy, friendly fire shootings were likely to occur."). Even here the Fifth Circuit concluded that a jury could find that "City officials were aware of the potential for constitutional violations in situations involving mentally ill persons." Pet. App. 19a–20a. The Fifth

Circuit also concluded, however, that a prior pattern must be shown. *Id.* 20a.

The City does not dispute that there are varying approaches of the circuits regarding the deliberate-indifference standard. *See* Note, *Thompson v. Connick: The Fifth Circuit Tiptoes Around the Issue of Qualified Prosecutorial Immunity and Collapses Municipal and Vicarious Liability Under § 1983*, 84 Tul. L. Rev. 1403, 1409 (2010) ("Circuit courts have varied in their application of the Court's deliberate indifference standard and heightened causation requirements articulated in *Monell*, *City of Canton*, and *Bryan County*.").

The City simply contends that the Fifth Circuit's approach—requiring a proven pattern of specific, actual violations even when the municipality is otherwise aware of the problem—flows from this Court's decisions. Opp. at 7. But that illogical approach undercuts this Court's precedent. As noted in the petition, the touchstone for municipal liability is awareness. Pet. at 9. Supervising Officer Mike Webb's explicit warning that untrained officers might "shoot and kill" individuals such as Omar contributed to that awareness. And so did expert testimony documenting at least ten incidents pre-dating Omar's death where Houston officers shot mentally ill people who were unarmed or carrying objects such as screwdrivers or pieces of wood. Pet. App. 20a. Contrast this with *City of Canton v. Harris*, where Justice O'Connor noted that "[t]here is quite simply nothing in this record to indicate that the city of Canton had any reason to suspect that failing to provide this kind of training would lead to injuries of

any kind . . . ." 489 U.S. 378, 399 (1989) (O'Connor, J., concurring in part and dissenting in part).

This Court should grant review to make clear that a showing of a prior pattern of actual violations is but one means to establish a municipality's awareness of the likelihood for constitutional violations.

II. The City does not dispute that other circuits would have concluded that the delegation of authority here made the decisionmaker a policymaker.

The petition explained that other circuits recognize that a municipality cannot insulate itself from § 1983 liability by simply delegating policy decisions to an official with unfettered discretion to make those decisions. Pet. at 15–16. These policy decisions include "choosing a course of action tailored to a particular situation . . . ." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). The circuits have been guided in part by *City of St. Louis v. Praprotnik*, in which this Court explained that determining whether the decisionmaker is a policymaker can depend on whether the decisionmaker is constrained by other policies and whether the decision is subject to review. 485 U.S. 112, 126 (1988).

The City does not dispute that other circuits take an approach that prevents municipalities from avoiding liability through the simple delegation of authority. The City simply contends that the Fifth Circuit's approach is correct. But the primary basis for seeking this Court's review is the circuits' differing approaches. As one commenter explains, "[d]espite the *Praprotnik* Court's intention to unify the law as to

when government action implicates a municipal policy, the contrasting views expressed by circuit courts about when policymakers have delegated their policymaking authority and whether certain officials are per se policymakers demonstrate that *Praprotnik* has proven to be an unsuccessful guide." Steven Cushman, *Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker*, 34 B.C. L. Rev. 693, 694 (1993).

Indeed, this case presents a perfect example of how a circuit can misread this Court's precedent regarding municipal liability. The Chief of Police appointed Captain Williams as the final decisionmaker for difficult-arrest decisions, such as those involving people who have locked themselves in a home. And under the applicable General Order and standard operating procedures, Captain Williams—and nobody else—decided what course of action to take for the particular situation. Pet. at 5. The City's two reasons to say that it is insulated from liability for that decision reveal the infirmities with the Fifth Circuit's approach.

First, the City says it cannot be liable for Captain Williams' discretionary action because he was constrained by the same policy that gave him the discretion to act. Opp. at 9. The City does not explain how this policy constrained his decision. To the contrary, the City admits that Williams "had the authority to use his discretion in how to handle special threats on a day-to-day basis." *Id.* Under the City's view, then, when a municipal policy delegates full authority to a subordinate decisionmaker, the municipality can never be liable because the decisionmaker is automatically "constrained" by that

same policy. This epitomizes the misreading of this Court's precedent. *See* Cushman, *supra*, at 722 ("[T]he restrictive view of delegation of authority [has] allowed municipalities, intentionally or unintentionally, to insulate themselves from § 1983 liability by divorcing final policymaking authority from final authority to act.").

Second, the City says it cannot be liable because Captain Williams' actions were subject to review, as he was disciplined by the Department for his actions. Opp. at 9. But that decision was later overturned for a crucial reason: Captain Williams "acted within the policies and procedures of the police department." Pet. App. 4a. In other words, under City policy, Captain Williams had unfettered discretion—delegated by the Chief of Police—to decide what action the City would take against Omar. So a correct review of his conduct under these circumstances would always conclude that he had acted within City policy. That means there is no meaningful review of Captain Williams' underlying policy decision itself—here, the forced entry and seizure of Omar. *Cf. Myers v. City of Cincinnati*, 14 F.3d 1115, 1118 (6th Cir. 1994) ("A municipality may not escape *Monell* liability . . . by simply delegating decisionmaking authority to a subordinate official and thereafter studiously refusing to review his unconstitutional action on the merits.").

Thus, under the proper analysis, this case replicates *Pembaur*. There, police officers spoke with Dr. Pembaur through the door at his office and insisted that he let them enter to detain people inside. 475 U.S. at 472. When he refused, the officers called for instructions, and the county prosecutor told the officers to go in—the officers then broke down the door

and detained two people. *Id.* When Pembaur's § 1983 suit against the municipality reached this Court, it held that the county prosecutor was acting as the final decisionmaker for the county and that the county could therefore be held liable. *Id.* at 485. Captain Williams had been delegated the same sort of authority when he ordered the untrained officers to break into the Valles' home, where the officers killed Omar.

This Court should grant review to resolve the conflicting views of the circuits regarding the line between policymakers and decisionmakers for purposes of municipal liability.

* * *

A final note is required to correct how the City has described Omar's killing to this Court. The City says that when "the officers entered the home, [Omar] charged at the officers with a hammer." Opp. at 2. Even the Fifth Circuit's opinion reveals that to be misleading. Pet. App. 4a n.1 ("In its summary judgment opinion, the district court improperly resolved the factual dispute about whether [Omar] possessed a hammer in the City's favor. It should have credited Mrs. Valle's testimony that her son did not have a hammer.").

CONCLUSION

The City has not disputed that the circuits approach the questions presented in conflicting ways. The petition should be granted.

Respectfully submitted,

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